

## LITIGATION TRUST AGREEMENT

THIS LITIGATION TRUST AGREEMENT (the "Litigation Trust Agreement"), dated as of \_\_\_\_\_, 2010, by and between (i) the Debtors, (ii) the Reorganized Debtors, (iii) the Acquisition Companies, in their limited capacity under Section 2.2, 2.3 and 2.6 hereof, (iv) the Committee (as defined below) and (v) the Litigation Trustee, is executed to facilitate the implementation of the [Fourth Amended Joint Plan of Reorganization dated March 8, 2010] (as the same may be amended, modified or supplemented from time to time in accordance with the terms and provisions thereof, the "Plan") that provides for the establishment of the litigation trust created hereby (the "Litigation Trust"). Capitalized terms used in this Litigation Trust Agreement and not otherwise defined herein shall have the meanings ascribed to them in the Plan.

### WITNESSETH

WHEREAS, on October 19, 2010 (the "Commencement Date"), the Debtors, each commenced a voluntary Chapter 11 Case in the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code");

WHEREAS, the United States Trustee for the Northern District of Texas (the "U.S. Trustee") appointed the Committee on November 2, 2009.

WHEREAS, on March 8, 2010, the Debtors filed the Plan with the Bankruptcy Court.

WHEREAS, the Bankruptcy Court entered the Confirmation Order confirming the Plan on [\_\_\_\_\_] , 2010, and the Plan became effective on [\_\_\_\_\_] , 2010 (the "Effective Date");

WHEREAS, the Plan provides for, among other things, the transfer of the Trust Assets to the Litigation Trust created hereby, and the distribution of funds held by the Litigation Trustee as provided for herein in accordance with Sections 3.2 and 4.4 hereof;

WHEREAS, the Litigation Trustee was duly appointed as a representative of the estates pursuant to section 1123(a)(5), (a)(7), and (b)(3)(B) of the Bankruptcy Code; and

WHEREAS, the Litigation Trust is established and intended to be treated (i) as a "liquidating trust" pursuant to U.S. Treasury Regulation section 301.7701-4 for the sole purpose of liquidating and distributing the Trust Assets (as defined below) for the benefit of the holders of Allowed General Unsecured Claims against the Debtors (whether Allowed on or after the Effective Date) and such other beneficiaries as described in Section 3.2 with no objective to continue or engage in the conduct of any trade or business; and (ii) as a grantor trust pursuant to subchapter J, subpart E of the Internal Revenue Code of 1986, as amended (the "Tax Code"), owned by the holders of Allowed General Unsecured Claims against the Debtors (whether Allowed on or after the Effective Date) and such other beneficiaries as described in the Section 3.2 as grantors;

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE I  
DEFINITIONS

1.1 Definitions.

"Acquisition Companies" means the following acquisition companies formed to acquire substantially all of the assets relating to the Business: Redwood-ERC Senior Living Holdings, LLC, Redwood-ERC Management, LLC, Redwood-ERC Development, LLC, Redwood-ERC Properties, LLC, Redwood-ERC Kansas, LLC, Redwood-ERC Concord L.P., Redwood-ERC Dallas, LLC, Redwood-ERC Houston, LLC, Redwood-ERC Ashburn, LLC, Redwood-ERC Littleton, LLC, Redwood-ERC Novi, LLC, Redwood-ERC Tinton Falls II, LLC, Redwood-ERC Senior Care, LLC and post-Effective Date Warminster.

"Allowed" means, with respect to any Claim, (i) a Claim against a Debtor which has been listed on the Debtor's Schedules, as such Schedules may be amended from time to time pursuant to Bankruptcy Rule 1009, as liquidated in amount and not disputed or contingent and for which no contrary Proof of Claim has been filed, (ii) any Claim for which a Proof of Claim was properly and timely filed in accordance with any order of the Bankruptcy Court, the Plan, the Bankruptcy Code, and the Bankruptcy Rules, as to which no objection to allowance has been interposed by a party in interest or as to which any objection has been determined by a Final Order to the extent such objection is determined in favor of the respective holder, or (iii) any Claim expressly allowed by a Final Order or pursuant to this Plan. Any Claim that has been or is hereafter listed in the Schedules as contingent, unliquidated or disputed, and for which no Proof of Claim has been timely filed, is not considered Allowed and shall be expunged on the Effective Date without further action by the Debtors or the Reorganized Debtors and without any further notice to or action, order or approval of the Bankruptcy Court.

"Approved GST Collection Expenses" shall have the meaning set forth in Section 4.3.

"Ashburn Construction Loan" means the loan made pursuant to that certain Construction Loan Agreement entered into as of May 31, 2007 in the maximum principal amount of \$100 million, as amended from time to time, between Ashburn, as borrower, and the financial institutions, which are or may from time to time become parties thereto, and PNC Bank, as successor to Mercantile Safe Deposit and Trust Company, as the administrative agent.

"Ashburn Junior Loan" means that certain loan made and entered into as of May 31, 2007 by and between Strategic Ashby Ponds Lender LLC, a Delaware limited liability company, as lender, and Ashburn, as borrower.

"Ashburn Tier A Beneficiaries" means holders of a Trade Claim against Ashburn.

"Bankruptcy Code" means title 11 of the United States Code, as amended from time to time, as applicable to the Chapter 11 Cases, as in effect on the Commencement Date, as modified by the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) that apply to cases pending as of its effective date but filed before its effective date.

"Bankruptcy Court" means the United States Bankruptcy Court for the Northern District of Texas, Dallas Division.

"Bankruptcy Rules" means the Federal Rules of Bankruptcy Procedure as promulgated by the United States Supreme Court under section 2075 of title 28 of the United States Code and any Local Rules of the Bankruptcy Court.

"Beneficiaries" means the holders of Allowed General Unsecured Claims against the Debtors and such other beneficiaries as described in Section 3.2.

"Board Deadlock" shall have the meaning set forth in Section 7.5.

"Business" means the Debtors' businesses as of the Commencement Date, including managing, developing and owning continuing care retirement communities.

"Business Day" means any day other than (a) a Saturday, (b) a Sunday, (c) any day on which commercial banks in New York, New York are required or authorized to close by law or executive order, and (d) the Friday after Thanksgiving Day.

"Campus" means each of the following retirement communities: Ann's Choice; Ashby Ponds; Eagle's Trace; Fox Run Village; Hickory Chase; Highland Springs; Linden Ponds; Maris Grove; Monarch Landing; Sedgebrook; Tallgrass Creek; Wind Crest; Brooksby Village; Cedar Crest Village; Charlestown; Greenspring Village; Henry Ford Village; Oak Crest Village; Riderwood Village; and Seabrook Village.

"Cash" means legal tender of the United States of America.

"Chapter 5 Avoidance Actions" means obligations, transfers of property or interests in property, offsets, debt forgiveness, Cash, and other types of kinds of property or interests in property or the value thereof, recoverable or avoidable pursuant to Chapter 5 of the Bankruptcy Code or other sections of the Bankruptcy Code or any applicable law.

"Chapter 11 Cases" means the cases commenced in the Bankruptcy Court by the Debtors pursuant to chapter 11 of the Bankruptcy Code.

"Claim" has the meaning set forth in section 101(5) of the Bankruptcy Code.

"Columbus Construction Loan" means that certain construction loan, dated April 16, 2008, in the maximum principal amount of \$90 million, between Columbus, as borrower, and KeyBank National Association, as administrative agent, and Fifth Third Bank, as syndication agent, and the other lenders that are party thereto from time to time.

"Columbus Junior Loan" means the loan made pursuant to that certain Loan Agreement made and entered into as of April 16, 2008 by and between Windsor OH Holdings, LLC, a Delaware limited liability company, as lender, and Columbus, as borrower, in the maximum principal amount of \$21,350,000, as amended from time to time.

"Columbus Tier A Beneficiaries" means holders of a Trade Claim against Columbus.

"Commencement Date" means October 19, 2009, the date on which the Debtors commenced the Chapter 11 Cases.

"Committee" means the statutory committee of unsecured creditors appointed in the Chapter 11 Cases on November 2, 2009 pursuant to section 1102 of the Bankruptcy Code.

"Committee Professionals' Fees" means the allowed and unpaid fees and expenses of Bracewell & Giuliani LLP and Protiviti Inc. incurred in connection with their representation of the Committee in the Debtors' Chapter 11 Cases that exceed \$1.1 million.

"Concord GP Tier A Beneficiaries" means holders of a Trade Claim against Concord GP.

"Concord Construction Loan" means the loan made pursuant to that certain Construction Loan Agreement made and entered into as August 30, 2005 by and between Concord, as borrower, the financial institutions that are or may from time to time become parties thereto and PNC Bank, National Association as successor to Mercantile-Safe Deposit and Trust Company, as administrative agent, in the maximum principal amount of \$70 million.

"Concord Junior Loan" means that certain transaction entered into pursuant to that certain "Purchase Agreement" made and entered into as of October 11, 2005, by and among Concord, ERC, and Strategic Concord Landholder, LP, a Delaware limited partnership, in the principal amount of \$25 million, as may be amended, modified and supplemented from time to time.

"Concord Tier A Beneficiaries" means holders of a Trade Claim against Concord.

"Confirmation Hearing" means the hearing held by the Bankruptcy Court to consider confirmation of the Plan pursuant to section 1129 of the Bankruptcy Code, as such hearing may be adjourned or continued from time to time.

"Confirmation Order" means the order of the Bankruptcy Court confirming the Plan pursuant to section 1129 of the Bankruptcy Code.

"Construction Lender" means each of the lenders under the Construction Loans made to each of the Landowner Debtors.

"Corporate Revolver" means the loan made pursuant to that certain Credit Agreement among ERC, the other loan parties thereto, the several lenders from time to time thereto, PNC Bank, National Association, as Administrative Agent, with PNC Capital Markets LLC, as Arranger, dated as of July 27, 2007, in the amount of \$236.5 million, as amended, modified or otherwise supplemented from time to time. Wilmington Trust FSB is successor Administrative Agent to PNC Bank, National Association. The Agent for the Corporate Revolver Lenders asserts that the Corporate Revolver is projected to have an outstanding balance of approximately \$190,682,573.00 as of December 31, 2009.

"Dallas Construction Loan" means that certain Revolving and Construction Loan between Bank of America, as Administrative Agent for itself and other lenders, and Dallas, as borrower, for Highland Springs, Dallas, Texas, pursuant to the loan agreement, dated November 30, 2005, in the maximum principal amount of \$70 million, as amended, restated, modified and supplemented from time to time.

"Dallas GP Tier A Beneficiaries" means holders of a Trade Claim against Dallas GP.

"Dallas Junior Loan" means that certain transaction entered into pursuant to that certain "Purchase Agreement" made and entered into as of April 28, 2006 by and among Dallas, ERC, and MSRESS III Dallas Campus, L.P., a Delaware limited partnership, in the principal amount of \$17.5 million, as may be amended, modified and supplemented from time to time.

"Dallas Tier A Beneficiaries" means holders of a Trade Claim against Dallas.

"Debtors" means Erickson Group, LLC ("Erickson Group"); Erickson Retirement Communities, LLC ("ERC"); Ashburn Campus, LLC ("Ashburn"); Columbus Campus, LLC ("Columbus"); Concord Campus, L.P. ("Concord"); Concord Campus GP, LLC ("Concord GP"); Dallas Campus, LP ("Dallas"); Dallas Campus GP, LLC ("Dallas GP"); Erickson Construction, LLC ("Erickson Construction"); Houston Campus, L.P. ("Houston"); Kansas Campus, LLC ("Kansas"); Littleton Campus, LLC ("Littleton"); Novi Campus, LLC ("Novi"); Senior Campus Services, LLC ("Senior Campus"); Warminster Campus, L.P. ("Warminster"); and Warminster Campus GP, LLC ("Warminster GP").

"Developing Campus" means a Campus that is owned by a respective Landowner, has been opened for operation, but is under development and construction. Each of the following is a Developing Campus: Ann's Choice; Ashby Ponds; Eagles Trace; Fox Run Village; Hickory Chase; Highland Springs; Linden Ponds; Maris Grove; Monarch Landing; Sedgebrook; Tallgrass Creek; and Wind Crest.

"Disclosure Statement" means the disclosure statement relating to the Plan, including, without limitation, all exhibits and schedules thereto, as approved by the Bankruptcy Court pursuant to section 1125 of the Bankruptcy Code.

"Disputed" means, with reference to any Claim, a Claim that has neither been Allowed nor disallowed pursuant to a Final Order of the Bankruptcy Court, and (a) if no proof of claim has been filed by the applicable deadline: (i) a Claim that has been or hereafter is listed on the Schedules as disputed, contingent, or unliquidated; or (ii) a Claim that has been or hereafter is listed on the Schedules as other than disputed, contingent, or unliquidated, but as to which the Debtors or Reorganized Debtors or any other party in interest has interposed an objection or request for estimation which has not been withdrawn or determined by a Final Order; or (b) if a proof of claim or other request for payment has been filed by the applicable deadline: (i) a Claim for which no corresponding Claim has been or hereafter is listed on the Schedules or Allowed in this Plan; (ii) a Claim for which a corresponding Claim has been or hereafter is listed on the Schedules as other than disputed, contingent, or unliquidated, but the nature or amount of the Claim or as asserted in the proof of claim varies from the nature and amount of such Claim as

listed on the Schedules to the extent of such variance; (iii) a Claim for which a corresponding Claim has been or hereafter is listed on the Schedules as disputed, contingent, or unliquidated; or (iv) a Claim for which a timely objection or request for estimation is interposed by the Debtors, the Reorganized Debtors or any other party in interest which has not been withdrawn or determined by a Final Order.

"Disputed Claims Reserve" means the assets of the Litigation Trust allocable to, or retained on account of, Disputed General Unsecured Claims, as determined from time to time, which assets shall (to the extent possible) be held separately from other assets of the Litigation Trust in an interest bearing account, but shall be subject to an allocable share of all expenses and obligations of the Litigation Trust.

"Distributable GST Collection Claim Proceeds" shall have the meaning set forth in Section 4.4(b).

"District Court" means the United States District Court for the Northern District of Texas having jurisdiction over the Chapter 11 Cases.

"Document Preservation Termination Date" shall have the meaning set forth in Section 2.6.

"EG Lenders" means holders of Erickson Group Guaranty Claims, identified on Schedule A hereto.

"Effective Date" means the first Business Day on which the conditions precedent specified in the Plan have been satisfied or waived.

"ERC Tier A Beneficiaries" means holders of a Trade Claim against ERC, including STAMP Claims subject to the STAMPS Pay-Over Obligations.

"Erickson Construction Tier A Beneficiaries" means holders of a Trade Claim against Erickson Construction.

"Erickson Group Guaranty Claims" means a Claim arising from Erickson Group's guarantee of payment or performance of the respective obligors' obligations under the Concord Construction Loan, Novi Construction Loan, Houston Construction Loan, and Littleton Construction Loan.

"Erickson Parties" means collectively: (1) John C. Erickson, (ii) Michael Erickson, (iii) Mark Erickson, (iii) Nancy Erickson, (iv) any other member of the Erickson family, (v) Baltimore Community Foundation, (vi) JCE Holding Corp., (vii) J&N Nevada Holdings Inc., (viii) Senior Living Limited, (ix) 2002 John C. Erickson GST Trust, (x) 2002 Nancy A. Erickson GST Trust, and (xi) any other trust, special purpose vehicle, partnership, corporation, limited liability company, or other entity created, formed or managed by or for the benefit of any of the foregoing. The Debtors are not Erickson Parties as such term is used herein.

"Estate Assigned Chapter 5 Avoidance Actions" means all Chapter 5 Avoidance Actions of Erickson Group (subject to the limitations described in Section 2.5 with respect to

Non-Threshold Employees (as defined below)), other than such claims against Redwood Retained Employees.

"Estate Assigned Claims" means Estate Assigned D&O Claims, Estate Assigned Chapter 5 Avoidance Actions, the GST Collection Claim, and all Non-Avoidance Causes of Action not acquired by the Acquisition Companies and not otherwise released by the Plan.

"Estate Assigned D&O Claims" means Non-Avoidance Causes of Action against all directors, officers, managing members and managers of Erickson Group.

"Final Order" means an order of the Bankruptcy Court or District Court as to which the time to appeal, petition for certiorari, or move for reargument or rehearing has expired and as to which no appeal, petition for certiorari, or motion for reargument or rehearing shall then be pending or as to which any right to appeal, petition for certiorari, or move to reargue or rehear shall have been waived in writing in form and substance satisfactory to the Debtors or, in the event that an appeal, writ of certiorari, or reargument or rehearing thereof has been sought, such order or judgment of the Bankruptcy Court or shall have been upheld by the highest court to which such order of judgment was appealed, or from which certiorari, reargument or rehearing was sought and the time to take any further appeal, petition for certiorari or move for reargument or rehearing shall have expired; provided, however, the possibility that a timely motion under Bankruptcy Rule 9024 or any applicable analogous rule may be filed with respect to such order shall not prevent such order from being a Final Order.

"General Unsecured Claims" means general unsecured claims other than (1) except for Permitted Non-Debtor Obligations, all deficiency claims of Corporate Revolver lenders (including, but not limited to, deficiency Interest Rate Swap Claims), (2) except for Permitted Non-Debtor Obligations and Permitted Construction Claims, all loan deficiency and guarantee claims of Construction Lenders, (3) all intercompany claims, (4) all obligations with respect to purchase option deposits, (5) claims under that certain Erickson Retirement Communities Amended and Restated Growth Participation Plan, effective as of January 1, 2006, (6) except for Permitted Non-Debtor Obligations, guarantees of ERC's non-debtor subsidiaries' pre-petition obligations, (7) UMBC Building Construction Loan deficiency claims, (8) all Junior Loan Claims that have been waived in writing, (9) community loan claims, (10) NFP Claims, and (11) purchase deposit claims.

"GST Collection Claim" means the rights of Erickson Group, as lender, under the GST Loan, including all claims and causes of action to enforce all remedies and the payment obligations thereunder. For the avoidance of doubt, the GST Collection Claim does not include any Chapter 5 Avoidance Action relating to the GST Loan, which claims and causes of action constitute Estate Assigned Chapter 5 Avoidance Actions.

"GST Collection Expenses" shall have the meaning set forth in Section 4.3.

"GST Loan" means that certain loan in the original principal amount of \$49,648,620 between Erickson Group, LLC, as lender and John C. Erickson GST Trust and 2002 Nancy A. Erickson GST Trust, as borrowers, dated as of May 4, 2005, as amended, modified, and supplemented from time to time.

"Guaranty Claim GST Allocation" shall have the meaning set forth in Section 4.4(b)(ii).

"Houston Construction Loan" means the loan made pursuant to that certain Construction Loan Agreement, amended and restated, dated September 15, 2004, in the maximum principal amount of \$50 million, between Houston, as borrower, and PNC Bank, as successor to Mercantile-Safe Deposit and Trust Company, as administrative agent, and other lenders party thereto.

"Houston Junior Loans" means that certain transaction entered into pursuant to that certain "Purchase Agreement" made and entered into as of November 18, 2004 by and among CNL Retirement ER6, LP, a Delaware limited partnership and Houston, as may be amended, modified and supplemented from time to time.

"Houston Tier A Beneficiaries" means holders of a Trade Claim against Houston.

"Identification Procedures Notice" shall have the meaning set forth in Section 3.4(b).

"Indemnified Persons" shall have the meaning set forth in Section 8.2.

"Interest Rate Swap Claim" means a Claim arising under that certain Master Agreement (related to the Corporate Revolver) between PNC Bank, National Association and ERC (Obligor), dated as of July 27, 2007.

"IRS" means the Internal Revenue Service.

"Junior Loan Claims" means an Allowed Claim arising under the (i) Ashburn Junior Loan, including the guarantee thereof, (ii) Columbus Junior Loan, including the guarantee thereof, (iii) Concord Junior Loan, including the guarantee thereof, (iv) Dallas Junior Loan, including the guarantee thereof, (v) Houston Junior Loan, including the guarantee thereof, (vi) Kansas Junior Loan, including the guarantee thereof, (vii) Littleton Junior Loan, including the guarantee thereof, (viii) Novi Junior Loan, including the guarantee thereof, and (ix) Warminster Junior Loan, including the guarantee thereof.

"Kansas Construction Loan" means the loan made pursuant to that certain Construction Loan Agreement made and entered into as of April 3, 2007, in the maximum principal amount of \$65 million, by and between Kansas, as borrower, the financial institutions that are or may from time to time become parties thereto and their respective successors and assigns and PNC Bank as successor to Mercantile-Safe Deposit and Trust Company, as Collateral and Administrative Agent for the Lenders.

"Kansas Junior Loan" means the loan made pursuant to that certain Loan Agreement made and entered into as of April 3, 2007 by and between MSRESS III Kansas Campus, L.P., a Delaware limited liability partnership, as lender, and Kansas, as borrower, in the maximum principal amount of \$25 million.

"Kansas Tier A Beneficiaries" means holders of a Trade Claim against Kansas.



"Landowner" means each Debtor that is a direct or indirect wholly-owned subsidiary of ERC which owns the land (or is lessee under a sale/leaseback- junior loan) and improvements associated with a Developing Campus.

"Landowner Debtor" means Ashburn; Columbus; Concord; Dallas; Houston; Kansas; Littleton; Novi; and Warminster.

"Litigation Claims" means the Estate Assigned Claims and the Transferred Claims.

"Litigation Claims Costs" means any and all costs, including reasonable professionals' fees, including any contingent portions, if any, incurred by the Litigation Trust, of prosecuting the Litigation Claims, enforcing any judgment on the Litigation Claims, and recovering proceeds on account of the Litigation Claims. The Guaranty Claim GST Allocation shall not constitute Litigation Claims Costs.

"Litigation Claims Proceeds" means the actual consideration, if any, received by the Litigation Trust as a result of any judgment, settlement, or compromise of any of the Litigation Claims.

"Litigation Expense Fund" shall have the meaning set forth in Section 5.5(a).

"Litigation Information" shall have the meaning set forth in Section 2.6.

"Litigation Trust" means the liquidating trust as established under Section 6.4 of the Plan and the Litigation Trust Agreement.

"Litigation Trustee" means the Person appointed in accordance with the Litigation Trust Agreement, and identified in the Plan Supplement, to administer the Litigation Trust.

"Litigation Trust Agreement" shall have the meaning set forth in the Preamble.

"Litigation Trust Initial Assets" means (i) the Litigation Claims, (ii) the unencumbered assets of the Debtors' Estates not otherwise accounted for or designated for other payment under the Plan, (iii) the Excluded Assets (as defined in the Plan) (excluding those Excluded Assets subject to prior liens, to the extent of the value of such liens, or other disposition pursuant to the terms of the Plan, including, without limitation, any disposition pursuant to Section 6.2.3.1 of the Plan and the Littleton Out-Parcel (as defined in the Plan)) and (iv) Trust Cash.

"Litigation Trust Interests" shall have the meaning set forth in Section 3.1.

"Littleton Construction Loan" means the loan made pursuant to that certain Construction Loan Agreement made as of March 29, 2006, in the maximum principal amount of \$83 million, by and between Littleton, as borrower, and Capmark Finance, Inc., f/k/a GMAC Commercial Mortgage Corporation, a California corporation, as may be amended, modified and supplemented from time to time.

"Littleton Junior Loan" means that certain transaction entered into pursuant to that certain "Purchase Agreement" made and entered into as of October 11, 2006 by and among Littleton, ERC, and MSRESS III Denver Campus, LLC, a Delaware limited liability company, as may be amended, modified and supplemented from time to time.

"Littleton Tier A Beneficiaries" means holders of a Trade Claim against Littleton.

"LT Fees" shall have the meaning set forth in Section 7.10(a)

"Master Lease" means a master lease and use agreement entered into between a NFP and a respective Landowner whereby the NFP leases the land and the Developing Campus from the related Landowner.

"NFP" means a non-profit organization that either owns a Campus or leases a Campus from the Landowner and operates the Campus. The following NFPs have leased the applicable Campuses from the applicable Landowners and entered into various agreements in connection therewith: Ann's Choice, Inc., a Maryland non-profit corporation; Ashby Ponds, Inc., a Maryland non-profit corporation; Eagle's Trace, Inc., a Maryland non-profit corporation; Fox Run Village, Inc., a Maryland non-profit corporation; Hickory Chase, Inc., a Maryland non-profit corporation; Highland Springs, Inc., a Maryland non-profit corporation; Linden Ponds, Inc., a Maryland non-profit corporation; Maris Grove, Inc., a Pennsylvania non-profit corporation; Monarch Landing, Inc., a Maryland non-profit corporation; Sedgebrook, Inc., a Maryland non-profit corporation; Tallgrass Creek, Inc., a Maryland non-profit corporation; and Wind Crest, Inc., a Maryland non-profit corporation.

"NFP Claim" means with respect to the Landowner Debtors, a Claim arising under the Working Capital Loans or Master Leases entered into between a respective Landowner and a respective NFP or any other Claims of an NFP or the NSC against the assets of the Debtors.

"No Action Deadline" shall have the meaning set forth in Section 7.5.

"Non-Avoidance Causes of Action" means (a) damages, general or statutory or exemplary (or all) or other relief, including but not limited to actions relating to or based upon – (i) indebtedness owing to a person, (ii) fraud, negligence gross negligence, willful injury or misconduct, acts or malice, or any other tort actions, including but not limited to defamation, malicious prosecution, or tortious interference with contract, (iii) breaches of contract, (iv) violations of federal or state securities laws, (v) violations of applicable corporate, limited liability company or partnership laws, (vi) breaches of fiduciary or agency duties, including, but not limited to, the duties of care and/or loyalty, (vii) recharacterization, (viii) illegal dividends, (ix) misrepresentations, (x) causes of action based on disregard of the corporate form or piercing the corporate veil or other liability theories, (xi) corporate waste, (xii) corporate opportunity, (xiii) any theory of recovery not otherwise released by the Plan, including any action or any action causing harm to a person, (xiv) equitable or legal subordination, (xv) indemnity rights against third parties, or (xvi) any other action listed in Bankruptcy Rule 7001, and (b) damages or other relief based upon any other claim of a person to the extent not specifically compromised or released pursuant to the Plan.

"Non-Threshold Employees" shall have the meaning set forth in Section 2.5.

"Novi Construction Loan" means the loan made pursuant to that certain Construction Loan Agreement made and entered into as of February 12, 2002, in the maximum principal amount of \$46 million, by and between Novi, as borrower, and PNC Bank, as successor to Mercantile-Safe Deposit and Trust Company, a Maryland banking corporation, as amended, modified and supplemented from time to time.

"Novi Junior Loan" means that certain transaction entered into pursuant to that certain "Purchase Agreement" made and entered into as February 28, 2003, by and among CNL Retirement ER2, LP, a Delaware limited partnership, as buyer, and Novi, as seller and lessee, as may be amended, modified and supplemented from time to time, in the principal amount of \$17 million.

"Novi Tier A Beneficiaries" means holders of a Trade Claim against Novi.

"NSC" means National Senior Campuses, Inc., a non-profit corporation which supports Oak Crest Village, Inc., Greenspring Village, Inc., Riderwood Village, Inc., Brooksby Village, Inc., Seabrook Village, Inc., Cedar Crest Village, Inc., Ann's Choice, Inc., Maris Grove, Inc., Fox Run Village, Inc., Wind Crest, Inc., Ashby Ponds, Inc., Highland Springs, Inc., Eagle's Trace, Inc., Linden Ponds, Inc., Sedgebrook, Inc., Monarch Landing, Inc. and Tallgrass Creek, Inc.

"Participating Junior Loan Claims" means a Junior Loan Claim that has not been voluntarily waived in writing, capped at \$100 million. To the extent that Junior Loan Claims that have not been voluntarily waived in writing exceed \$100 million (the "Excess Junior Loan Claims"), the Participating Junior Loan Claims of holders thereof shall be reduced Pro Rata and the holders of such Excess Junior Loan Claims shall be deemed to have waived the right to receive a distribution from the Litigation Trust on account of such excess amounts.

"Participating Permitted Construction Claims" means Permitted Construction Claims, capped at \$70 million. To the extent that Permitted Construction Claims exceed \$70 million (the "Excess Construction Claims"), the Participating Permitted Construction Claim of each holder thereof shall be reduced Pro Rata. The holders of Excess Construction Claims shall be deemed to have waived the right to receive a distribution from the Litigation Trust on account of such excess amounts. The holders of Participating Permitted Construction Claims are identified on Schedule B.

"Participating Permitted Non-Debtor Obligations" means Permitted Non-Debtor Obligations capped at \$21 million. To the extent that Permitted Non-Debtor Obligations exceed \$21 million (the "Excess Permitted Non-Debtor Obligations"), the Participating Permitted Non-Debtor Obligations of holders thereof shall be reduced Pro Rata. The holders of Excess Permitted Non-Debtor Obligations shall be deemed to have waived the right to receive a distribution from the Litigation Trust on account of such excess amounts.

"Permitted Construction Claims" means an Allowed General Unsecured Claim arising under the Columbus Construction Loan, including the guarantee thereof, and the Kansas Construction Loan, including the guarantee thereof.

"Permitted Non-Debtor Obligation" means an Allowed General Unsecured Claim arising from a guarantee by a Subject Debtor of pre-petition obligations (including letters of credit) of non-debtor ERC subsidiaries or affiliates, provided that Permitted Non-Debtor Obligations shall not include (i) any claim held by, (ii) guarantees of pre-petition obligations of, or (iii) letters of credit issued to the following: John Erickson, any member of the Erickson family, any trust or special purpose vehicle created or managed primarily for the benefit of John Erickson or any member of the Erickson family.

"Person" means an individual, partnership, corporation, limited liability company, business trust, joint stock company trust, unincorporated association, joint venture, governmental authority, governmental unit or other entity of whatever nature.

"Plan" shall have the meaning set forth in the Preamble.

"Plan Supplement" means the compilation of documents and forms of documents specified in the Plan that will be filed with the Bankruptcy Court on or before the date that is five (5) days prior to the Plan Confirmation Hearing (as defined in the Plan), and will be a part of the Plan.

"Pro Rata" means the proportion that the amount of any Claim in a particular Tier or Sub-Tier, as applicable, bears to the aggregate amount of all Claims in such Tier or Sub-Tier, as applicable, including the estimated Allowed amount of any Disputed Claims in such Tier or Sub-Tier.

"Proration Trigger Event" shall have the meaning set forth in Section 3.2.

"Privileges" shall have the meaning set forth in Section 2.2(c).

"Redwood Retained Employees" means all current officers, directors and employees of the Debtors employed by an Acquisition Company on the Effective Date through the ninety (90) day anniversary thereof, other than the Erickson Parties, including, but not limited to, those individuals listed in Exhibit C of the Plan.

"Reorganized Debtors" means the Debtors on and after the Effective Date. For the avoidance of doubt, the Acquisition Companies are not Reorganized Debtors.

"Schedules" means the schedules of assets and liabilities and the statement of financial affairs filed by the Debtors pursuant to Bankruptcy Code section 521, Bankruptcy Rule 1007, and the Official Bankruptcy Forms of the Bankruptcy Rules as such schedules and statements have been supplemented or amended from time to time through the Effective Date.

"Senior Campus Tier A Beneficiaries" means holders of a Trade Claim against Senior Campus.

"STAMPS" means the Subordinated Taxable Adjustable Mezzanine Put Securities Series 2007 issued pursuant to that certain Trust Indenture, dated as of November 1, 2007 between ERC and The Bank of New York, as trustee, as amended, modified and supplemented from time to time.

"STAMP Fees" means the fees of the STAMPS indenture trustee, up to \$250,000.

"Subject Debtor" means each of the Debtors other than Erickson Group.

"STAMPS Pay-Over Obligation" shall have the meaning set forth in Section 3.1(a)(viii).

"Tier A Beneficiaries" means, collectively, Ashburn Tier A Beneficiaries, Columbus Tier A Beneficiaries, Concord Tier A Beneficiaries, Concord GP Tier A Beneficiaries, Dallas Tier A Beneficiaries, Dallas GP Tier A Beneficiaries, Erickson Construction Tier A Beneficiaries, ERC Tier A Beneficiaries, Houston Tier A Beneficiaries, Kansas Tier A Beneficiaries, Littleton Tier A Beneficiaries, Novi Tier A Beneficiaries, Senior Campus Tier A Beneficiaries, Warminster Tier A Beneficiaries and Warminster GP Tier A Beneficiaries.

"Tier A Interests" shall have the meaning set forth in Section 3.1(a).

"Tier A Percentage Recovery" means the quotient of \$7 million divided by the total amount of Allowed General Unsecured Claims for which Tier A Beneficiaries are entitled to receive a Tier A Interest, plus the STAMP Fees, but excluding all other Claims of the STAMPS.

"Tier B Beneficiaries" means holders of Participating Permitted Non-Debtor Obligations and Participating Permitted Construction Claims.

"Tier B Interests" shall have the meaning set forth in Section 3.1(b).

"Tier B/C Percentage Recovery" means the quotient of the total amount of distributions made by the Litigation Trust to holders of Tier B Interests and Tier C Interests, in the aggregate, divided by the total amount of Allowed General Unsecured Claims for which Tier B Beneficiaries and Tier C Beneficiaries are entitled to receive Tier B Interests and Tier C Interests, respectively, in the aggregate.

"Tier C Beneficiaries" means holders of Participating Junior Loan Claims.

"Tier C Interests" shall have the meaning set forth in Section 3.1(c).

"Tier C Trigger Event" shall have the meaning set forth in Section 3.2.

"Trade Claims" means Allowed General Unsecured Claims other than (i) Junior Loan Claims, (ii) Permitted Non-Debtor Obligations, and (iii) Permitted Construction Claims.

"Trade Dividend" shall have the meaning set forth in Section 3.2.

"Transferred Claims" means to the extent provided in the Plan (i) all Chapter 5 Avoidance Actions of the Subject Debtors, including actions against John Erickson and members of the Erickson family, but excluding any Chapter 5 Avoidance Actions against Redwood

Retained Employees, and (ii) all Non-Avoidance Causes of Action against the directors and officers of the Subject Debtors in their capacities as such.

"Trust Assets" means (i) the Litigation Trust Initial Assets, (ii) Litigation Claims Proceeds, and (iii) any proceeds, including interest and any proceeds earned pursuant to Section 5.10 hereof, of the foregoing assets. For the avoidance of doubt, Trust Assets shall not include the Guaranty Claim GST Allocation.

"Trust Cash" means \$2.5 million in Cash.

"Trust Distributable GST Collection Claim Proceeds" shall have the meaning set forth in Section 4.4(b)(ii).

"Trust Governing Board" shall have the meaning set forth in Section 7.1.

"Trust Reports" shall have the meaning set forth in Section 5.15(b).

"UMBC Building Construction Loan" means the loans made pursuant to that certain Building Loan Agreement between Erickson Construction, Senior Campus, Senior Campus Care, LLC, and SCL Realty, LLC, as Borrowers, ERC, as guarantor, Manufacturers and Traders Trust Company as Lender and Administrative Agent, and Wilmington Trust, FSB, as Lender, dated July 31, 2008.

"Unidentified Beneficiaries" shall have the meaning set forth in Section 3.4(b).

"Warminster GP Tier A Beneficiaries" means holders of a Trade Claim against Warminster GP.

"Warminster Junior Loan" means that certain real estate financing contract between Warminster and HCP ER3 (f/k/a CNL Retirement ER3, LP), a Delaware limited partnership, as may be amended, modified and supplemented from time to time.

"Warminster Tier A Beneficiaries" means holders of a Trade Claim against Warminster.

"Working Capital Loan" means a loan entered into between a Landowner and NFP, pursuant to which the Landowner loans the NFP the funds necessary to cover operating deficiencies of the NFP.

1.2 Unless otherwise specified, Article, Section and Paragraph references herein are to Articles, Sections and Paragraphs of this Litigation Trust Agreement.

## ARTICLE II

### ESTABLISHMENT OF THE LITIGATION TRUST

#### 2.1 Establishment of Litigation Trust and Appointment of Litigation Trustee.

(a) Pursuant to the Plan, the Debtors, the Committee and the Litigation Trustee hereby establish a trust which shall be known as the "Litigation Trust" on behalf of the Beneficiaries and with respect to the GST Collection Claim, the EG Lenders and the Beneficiaries (the Beneficiaries and the EG Lenders, collectively, the "GST Beneficiaries").

(b) The Litigation Trustee is hereby appointed as trustee of the Litigation Trust effective as of the Effective Date and agrees to accept and hold the assets of the Litigation Trust in trust for the Beneficiaries and, with respect to the GST Collection Claim, the GST Beneficiaries, subject to the terms of the Plan and this Litigation Trust Agreement. The Litigation Trustee and each successor trustee serving from time to time hereunder shall have all the rights, powers and duties set forth herein.

(c) Any action by the Litigation Trustee and/or the Trust Governing Board which affects the interest of more than one Beneficiary and/or EG Lender shall, if made in good faith, be binding and conclusive on all Beneficiaries and, with respect to the GST Collection Claim, on all GST Beneficiaries, subject to the provisions of Section 4.2 requiring, upon motion and notice to the EG Lenders, Bankruptcy Court approval of any disposition of the GST Collection Claim, even if such beneficiaries have different or conflicting interests and no Person shall have recourse against the Litigation Trustee or the Trust Governing Board with respect to any such action.

2.2 Transfer of Trust Assets and Rights to the Litigation Trust. Pursuant to the Plan, as of the Effective Date:

(a) The Debtors hereby transfer, assign, and deliver to the Litigation Trust, without recourse, and the Litigation Trust hereby assumes, (i) \$2.5 million of Trust Cash, (ii) except for the Transferred Claims and the GST Collection Claim, the other Litigation Trust Initial Assets free and clear of any and all liens, claims, encumbrances or interests of any kind and (iii) the GST Collection Claim, except for the rights of the EG Lenders set forth in Article IV hereto, free and clear of any and all liens, claims, encumbrances or interests of any kind.

(b) The Acquisition Companies hereby transfer, assign, and deliver to the Litigation Trust, without recourse, and the Litigation Trust hereby assumes, all of their respective rights, title, and interests in and to the Transferred Claims free and clear of any and all liens, claims, encumbrances or interests of any kind in such property; and

(c) The Debtors, the Acquisition Companies and the Committee hereby transfer, assign, and deliver to the Litigation Trustee and the Trust Governing Board, without waiver, and the Litigation Trustee and the Trust Governing Board hereby assume, all of their respective rights, title and interests in and to any attorney-client privilege, work-product privilege, or other privilege or immunity (collectively, "Privileges") attaching to any documents or communications (whether written or oral) associated with the Transferred Claims for the

purpose of the prosecution thereof, in the case of the Acquisition Companies, and the Estate Assigned Claims in the case of the Debtors, which shall vest in the Litigation Trustee and the Trust Governing Board, in trust, and, consistent with section 1123(b)(3)(B) of the Bankruptcy Code, for the benefit of the Beneficiaries.

2.3 Title to the Trust Assets. The transfer of the Trust Assets to the Litigation Trustee shall be made by the Debtors and the Acquisition Companies, without representation, warranty or recourse of any kind, for the sole benefit and on behalf of the Beneficiaries and, with respect to the GST Collection Claim, the GST Beneficiaries. Upon the transfer of the Litigation Trust Initial Assets to the Litigation Trust, the Litigation Trust shall succeed to all of the Debtors' and the Acquisition Companies' rights, title and interests in the Trust Assets and no other entity shall have any interest, legal, beneficial, or otherwise, in the Litigation Trust or the Trust Assets upon their assignment and transfer to the Litigation Trust (other than as provided herein or in the Plan).

2.4 Nature and Purpose of the Litigation Trust.

(a) Purpose. The Litigation Trust is organized and established as a trust pursuant to which the Litigation Trustee, subject to the terms and conditions contained herein and in the Plan, is to (i) liquidate any non-cash Trust Assets; (ii) prosecute and resolve the Litigation Claims (subject to Section 2.5 hereof); (iii) maximize recovery of the Trust Assets for the benefit of Beneficiaries and, with respect to the GST Collection Claim, the GST Beneficiaries; and (iv) distribute the proceeds of the Trust Assets to Beneficiaries and, with respect to the GST Collection Claim, the GST Beneficiaries.

(b) Relationship. This Litigation Trust Agreement is intended to create a trust and a trust relationship and to be governed and construed in all respects as a trust. The Litigation Trust is not intended to be, and shall not be deemed to be or treated as, a general partnership, limited partnership, joint venture, corporation, joint stock company or association, nor shall the Litigation Trustee, the Trust Governing Board (or any of its Directors), or the Beneficiaries, or any of them, for any purpose be, or be deemed to be or treated in any way whatsoever to be, liable or responsible hereunder as partners or joint venturers. The relationship of the Beneficiaries to the Litigation Trustee and the Trust Governing Board shall be solely that of beneficiaries of a trust and shall not be deemed a principal or agency relationship, and their rights shall be limited to those conferred upon them by this Litigation Trust Agreement.

2.5 Claims Against Non-Threshold Employees. Except with respect to the Erickson Parties, the Litigation Trust hereby covenants not to prosecute Chapter 5 Avoidance Actions against employees of the Subject Debtors if (A) such employees received transfers during the period ending October 18, 2008 and beginning on the date that the applicable statute of limitations for fraudulent conveyances for such transfer began to run and (B) such transfers during that period do not exceed \$350,000, in the aggregate; provided that the covenant not to sue will not apply to transfers to such employees within one (1) year prior to October 19, 2009 (such employees falling below the foregoing threshold, "Non-Threshold Employees"). In addition to the foregoing, the Litigation Trust acknowledges and agrees that it is not acquiring any interest in any Chapter 5 Avoidance Actions against any Redwood Retained Employees.



2.6 Cooperation of Reorganized Debtors and Acquisition Companies. Reorganized Debtors and the Acquisition Companies, upon reasonable notice, shall provide information, to the extent the Reorganized Debtors and/or the Acquisition Companies have such information, to the Litigation Trustee sufficient to enable the Litigation Trustee to perform its duties hereunder. Reorganized Debtors and the Acquisition Companies shall cooperate with the Litigation Trustee in the administration of the Litigation Trust, including, without limitation, in providing documentation, witness testimony, and other evidence in support of the prosecution of the Litigation Claims, at no cost or expense to the Reorganized Debtors or the Acquisition Companies; provided that such costs and expenses paid by the Litigation Trust shall be reasonable. The Reorganized Debtors' and Acquisition Companies' obligation to preserve documents and electronic data and provide access to such information to the Litigation Trustee to facilitate the prosecution of any and all Non-Avoidance Causes of Action ("Litigation Information") shall terminate on the one (1) year anniversary of the Effective Date (the "Document Preservation Termination Date"). No later than one-hundred and twenty (120) days prior to the Document Preservation Termination Date, the Reorganized Debtors, the Acquisition Companies and the Litigation Trustee will commence good faith negotiations for the transfer of all Litigation Information to the Litigation Trustee. The transfer of Litigation Information to the Litigation Trust shall be at the Litigation Trust's expense and such transfer shall commence no later than ninety (90) days prior to the Document Preservation Termination Date and shall be completed no later than five (5) days prior to the Document Preservation Termination Date.

2.7 Appointment as Representative. Pursuant to section 1123(b)(3) of the Bankruptcy Code, the Plan appointed the Litigation Trustee as the duly appointed representative of the estates, and, as such, the Litigation Trustee succeeds to all of the rights and powers of a trustee in bankruptcy with respect to prosecution of the Litigation Claims for the benefit of the Beneficiaries and, with respect to the GST Collection Claim, the GST Beneficiaries. To the extent that any Litigation Claims cannot be transferred to the Litigation Trust because of a restriction on transferability under applicable non-bankruptcy law that is not superseded or preempted by section 1123 of the Bankruptcy Code or any other provision of the Bankruptcy Code, such Litigation Trust Initial Assets shall be deemed to have been retained by the Reorganized Debtors and the Litigation Trustee shall be deemed to have been designated as a representative of the Debtors' estates pursuant to section 1123(b)(3)(B) of the Bankruptcy Code to enforce and pursue such Litigation Claims on behalf of the estates. Notwithstanding the foregoing, all net proceeds of the Trust Assets shall be transferred to the Beneficiaries consistent with the provisions of the Plan and this Litigation Trust Agreement in accordance with the Section 3.2.

2.8 Relationship to, and Incorporation of, the Plan. The principal purpose of this Litigation Trust Agreement is to aid in the implementation of the Plan and the Confirmation Order, and therefore this Litigation Trust Agreement incorporates the provisions of the Plan and the Confirmation Order by this reference. To that end, the Litigation Trustee shall have full power and authority to take any action consistent with the purpose and provisions of the Plan, and to seek any orders from the Bankruptcy Court in furtherance of implementation of the Plan and this Litigation Trust Agreement. If any provisions of this Litigation Trust Agreement are found to be inconsistent with the provisions of the Plan or the Confirmation Order, each such document shall have controlling effect in the following rank order: (i) the Confirmation Order; (ii) the Plan; and (iii) this Litigation Trust Agreement.

## ARTICLE III

### LITIGATION TRUST INTERESTS

3.1 Allocation of Litigation Trust Interests. Beneficial interests in the Litigation Trust (the "Litigation Trust Interests") will be represented by book entries on the books and records of the Litigation Trust as follows:

(a) **Tier A Interests.** The following interests (collectively, "Tier A Interests") shall be issued to Tier A Beneficiaries:

(i) ***Tier A Ashburn Interest:*** Each Ashburn Tier A Beneficiary shall receive a Tier A Ashburn Interest entitling the holder of such interest to receive its Pro Rata share with other Ashburn Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(ii) ***Tier A Columbus Interest:*** Each Columbus Tier A Beneficiary shall receive a Tier A Columbus Interest entitling the holder of such interest to receive its Pro Rata share with other Columbus Tier A Beneficiaries of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(iii) ***Tier A Concord Interest:*** Each Concord Tier A Beneficiary shall receive a Tier A Concord Interest entitling the holder of such interest to receive its Pro Rata share with other Concord Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(iv) ***Tier A Concord GP Interest:*** Each Concord GP Tier A Beneficiary shall receive a Tier A Concord GP Interest entitling the holder of such interest to receive its Pro Rata share with other Concord GP Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(v) ***Tier A Dallas Interest:*** Each Dallas Tier A Beneficiary shall receive a Tier A Dallas Interest entitling the holder of such interest to receive its Pro Rata share with other Dallas Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(vi) ***Tier A Dallas GP Interest:*** Each Dallas GP Tier A Beneficiary shall receive a Tier A Dallas GP Interest entitling the holder of such interest to receive its Pro Rata share with other Dallas GP Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(vii) ***Tier A Erickson Construction Interest:*** Each Erickson Construction Tier A Beneficiary shall receive a Tier A Erickson Construction Interest entitling the holder of such interest to receive its Pro Rata share with other Erickson Construction Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(viii) ***Tier A ERC Interest:*** Each ERC Tier A Beneficiary shall receive a Tier A ERC Interest entitling the holder of such interest to receive its Pro Rata share with other ERC Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets. Holders of Allowed STAMPS Claims shall be entitled to receive a Pro Rata share of all distributions made to ERC Tier A Beneficiaries; provided, however, any amount distributable to the holders of Allowed STAMPS Claims (other than amounts distributable in respect of STAMP Fees) shall be paid to other ERC Tier A Beneficiaries (excluding holders of Allowed STAMPS Claims) Pro Rata (the "STAMPS Pay-Over Obligation"), provided, further, however, upon the occurrence of the Proration Trigger Event, the STAMPS Pay-Over Obligation shall be deemed waived in its entirety and, thereafter, holders of Allowed STAMPS Claims shall be entitled to a Pro Rata share of all distributions made to ERC Tier A Beneficiaries.

(ix) ***Tier A Houston Interest:*** Each Houston Tier A Beneficiary shall receive a Tier A Houston Interest entitling the holder of such interest to receive its Pro Rata share with other Houston Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(x) ***Tier A Kansas Interest:*** Each Kansas Tier A Beneficiary shall receive a Tier A Kansas Interest entitling the holder of such interest to receive its Pro Rata share with other Kansas Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(xi) ***Tier A Littleton Interest:*** Each Littleton Tier A Beneficiary shall receive a Tier A Littleton Interest entitling the holder of such interest to receive its Pro Rata share with other Littleton Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(xii) ***Tier A Novi Interest:*** Each Novi Tier A Beneficiary shall receive a Tier A Novi Interest entitling the holder of such interest to receive its Pro Rata share with other Novi Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(xiii) ***Tier A Senior Campus Interest:*** Each Senior Campus Tier A Beneficiary shall receive a Tier A Senior Campus Interest entitling the holder of such interest to

receive its Pro Rata share with other Senior Campus Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(xiv) ***Tier A Warminster Interest:*** Each Warminster Tier A Beneficiary shall receive a Tier A Warminster Interest entitling the holder of such interest to receive its Pro Rata share with other Warminster Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(xv) ***Tier A Warminster GP Interest:*** Each Warminster GP Tier A Beneficiary shall receive a Tier A GP Warminster Interest entitling the holder of such interest to receive its Pro Rata share with other Warminster GP Tier A Beneficiaries of a percent of all distributions made to Tier A Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

Following the Trust Governing Board's determination of the Pro Rata percentage of distributions to be made to holders of each class of Tier A Interests, the Litigation Trustee will seek Bankruptcy Court approval with respect to such allocations and distributions.

(b) **Tier B Interests.** The following interests (collectively, "Tier B Interests") shall be issued to Tier B Beneficiaries:

(i) Each Tier B Beneficiary shall receive a Tier B Interest entitling the holder of such interest to receive its Pro Rata share with other Tier B Beneficiaries of a percent of all distributions made to Tier B Beneficiaries, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(ii) The Trust Governing Board may, in its discretion, create separate sub-classes of Tier B Interests in the event that the Allowed General Unsecured Claim(s) of Tier B Beneficiaries arise from General Unsecured Claims against different Debtors. Any such determination shall be subject to approval by the Bankruptcy Court.

(iii) Following the Trust Governing Board's determination of the Pro Rata percentage of distributions to be made to holders of each class of Tier B Interests, the Litigation Trustee will submit a request, with notice to all parties in interest, for Bankruptcy Court approval with respect to such allocation and distributions.

(iv) Holders of Tier B Interests arising from Permitted Non-Debtor Obligation and Columbus Construction Loan Claims may not receive a distribution unless they use their respective good faith efforts to satisfy their claims first from assets of the applicable non-debtor ERC subsidiary or affiliate or Columbus collateral, respectively, before seeking to enforce their rights to receive a distribution from the Litigation Trust. To the extent that such Beneficiaries have received payment in respect of their claims from the assets of the applicable

non-debtor ERC subsidiary or affiliate or Columbus collateral, as applicable, such payment will be deemed to be first applied to such Beneficiary's respective Excess Permitted Non-Debtor Obligation or Excess Construction Claim and then to reduce the number of Tier B Interests owned by such Beneficiary. The Litigation Trustee may withhold distributions from holders of the Tier B Interests arising from Permitted Non-Debtor Obligation and Columbus Construction Loan Claims until such time as the amount of their respective Allowed Claims are determined.

(c) **Tier C Interests.**

(i) Each Tier C Beneficiary shall receive a participation interests (a "Tier C Interest") entitling the holder of such interest to receive its Pro Rata share with other Tier C Beneficiaries of a percent of all distributions made to holders of each class of Tier C Interests, as determined by the Trust Governing Board, in its discretion, after the completion of an investigation, review and evaluation of the Litigation Claims and other Trust Assets.

(ii) The Trust Governing Board may, in its discretion, create separate sub-classes of Tier C Interests in the event that the Allowed General Unsecured Claim(s) of Tier C Beneficiaries arise from General Unsecured Claims against different Debtors. Any such determination shall be subject to approval by the Bankruptcy Court.

3.2 Distribution Schedule. Any distribution of Litigation Claims Proceeds or other Trust Assets by the Litigation Trust shall be made in the following manner and order:

- first, to pay holders of Tier A Interests, Pro Rata, in accordance with Section 3.1, capped at \$7 million, subject to the Proration Trigger Event (the "Trade Dividend");
- second, after payment of the Trade Dividend in full, to pay holders of Tier B Interests, Pro Rata, up to \$2 million (the "Tier C Trigger Event");
- third, after the occurrence of the Tier C Trigger Event, to pay holders of Tier B Interests and Tier C Interests, Pro Rata, subject to the Proration Trigger Event;
- fourth, after the Trade Dividend has been paid in full and if, as a result of future distributions to holders of Tier B Interests and Tier C interests, the Tier B/C Percentage Recovery equals or exceeds the Tier A Percentage Recovery (the "Proration Trigger Event"), all subsequent distributions from the Litigation Trust will then be made to holders of Tier A Interests, Tier B Interests and Tier C Interests, on a Pro Rata basis; provided that such future distributions to holders of Tier A Interests shall be made in accordance with Section 3.2;

Notwithstanding anything to the contrary herein, including this Section 3.2, distributions may only be made to Beneficiaries after the prior payment, in full, of all outstanding Committee Professionals' Fees and Litigation Costs.

3.3 Interests Beneficial Only. The ownership of a Litigation Trust Interest shall not entitle any Beneficiary to any title in or to the assets of the Litigation Trust as such (which title shall be vested in the Litigation Trustee) or to any right to call for a partition or division of the assets of the Litigation Trust.

3.4 Identification of Holders of Litigation Trust Interests.

(a) The Litigation Trust will not issue any certificate or certificates to evidence any Litigation Trust Interests. The record holders of Litigation Trust Interests shall be recorded and set forth in a register maintained by the Litigation Trustee expressly for such purpose. Such register shall be updated monthly. All references in this Litigation Trust Agreement to holders of Litigation Trust Interests shall be read to mean holders of record as set forth in the official register maintained by the Litigation Trustee and shall not mean any beneficial owner not recorded on such official registry. The distribution of Trust Assets to either a holder of Allowed General Unsecured Claims or to a holder of Disputed Claims shall be accomplished as set forth in the Plan and herein.

(b) No later than ninety (90) days from the Effective Date, the Litigation Trustee shall file a motion, with notice to all parties in interest, with the Bankruptcy Court explaining the procedures for holders of Participating Permitted Non-Debtor Obligations, Participating Junior Loan Claims and STAMP Claims (the "Unidentified Beneficiaries") to identify themselves to the Litigation Trustee in order to receive distributions and allocable tax information from the Litigation Trust (the "Identification Procedures Notice"). Unidentified Beneficiaries shall have one (1) year from the filing of the Identification Procedures Notice to comply with the identification procedures therein.

3.5 Non-Transferability of Litigation Trust Interests. No transfer, assignment, pledge or hypothecation of any Litigation Trust Interests, either in whole or in part, shall be effective until and unless the Litigation Trustee receives written notice of such transfer.

3.6 Exemption from Registration. The parties hereto intend that the rights of the Beneficiaries arising under this Litigation Trust shall not be "securities" under applicable laws, but none of the parties hereto represent or warrant that such rights shall not be securities or shall be entitled to exemption from registration under applicable securities laws. If such rights constitute securities, the parties hereto intend for the exemption from registration provided by Section 1145 of the Bankruptcy Code and under applicable securities laws to apply to their issuance under the Plan.

## ARTICLE IV

### GST COLLECTION CLAIM

Notwithstanding anything to the contrary herein, the GST Collection Claim shall be subject to the terms and conditions of this Article IV. In the event that any provision of this Litigation Trust Agreement conflicts with any provision of this Article IV, the terms of this Article IV shall control with respect to the GST Collection Claim.

4.1 Authority to Direct Litigation; Reporting. The Litigation Trustee shall have sole authority to hold, pursue, prosecute, as the case may be, the GST Collection Claim (including any counterclaims to the extent such counterclaims are setoff against the proceeds of the GST Collection Claim (the "GST Collection Claim Proceeds")). In addition to Trust Reports (as defined in Section 5.15(b)), upon a reasonable written request of an EG Lender, the Litigation Trustee shall provide such EG Lender with a summary on the status of the Litigation Trustee's investigation and prosecution of the GST Collection Claim and, upon ten (10) days prior written notice, access to books and records of the Litigation Trustee relating to the GST Collection Claim; except to the extent that such summaries would violate any laws or result in the loss of any attorney client privilege.

4.2 Settlement Authority. The Litigation Trustee shall be empowered and authorized to settle, dispose of or abandon the GST Collection Claim only upon (i) written consent of the Trust Governing Board; and (ii) approval by the Bankruptcy Court upon motion and notice to the EG Lenders. The Litigation Trustee will notify the Trust Governing Board of any proposal for the settlement by or to the Litigation Trustee in respect of the GST Collection Claim, and shall be directed by the Trust Governing Board in making, accepting or rejecting any such proposal. Any determination made by the Bankruptcy Court, with regard to the amount or timing of settlement or other disposition of the GST Collection Claim shall be conclusive and binding on all GST Beneficiaries.

4.3 Fees and Expenses of Prosecution. (a) The Litigation Trust shall be responsible for the payment of all reasonable and necessary fees and expenses arising from the prosecution of the GST Collection Claim (the "GST Collection Expenses") in accordance with Section 5.5 hereof.

(b) In the event that GST Collection Claim Proceeds are recovered from prosecution of the GST Collection Claim, whether from a court judgment, settlement or other disposition, the Litigation Trustee shall seek approval of the GST Collection Expenses from the Bankruptcy Court upon motion and notice to the EG Lenders, and the Litigation Trust shall be reimbursed for any Bankruptcy Court approved portion of the GST Collection Expenses (such portion, the "Approved GST Collection Expenses") in accordance with Section 4.4(a) below. Any GST Collection Expenses not approved by the Bankruptcy Court shall be paid to the Litigation Trust out of Trust Distributable GST Collection Claim Proceeds, if any, prior to any distributions to Beneficiaries.

(c) In the event that no proceeds are recovered from the prosecution of the GST Collection Claim, the Litigation Trust shall be responsible for the payment of all GST Collection Expenses without recourse to the EG Lenders. For the avoidance of doubt, at no time shall the EG Lenders be required to contribute or pay any costs and expenses incurred by the Litigation Trust in connection with the GST Collection Claim, other than as provided in Section 4.4(a).

4.4 Distribution of GST Collection Claim Proceeds. The distribution of GST Collection Claim Proceeds, if any, shall be made in the following manner and order:

(a) First, to the payment of Approved GST Collection Expenses;

(b) Second, after the payment of all Approved GST Collection Expenses from the GST Collection Claim Proceeds (the remaining GST Collection Claim Proceeds, the "Distributable GST Collection Claim Proceeds"), the Distributable GST Collection Claim Proceeds shall be distributed as follows:

(i) 50% of the Distributable GST Collection Claim Proceeds (the "Guaranty Claim GST Allocation") shall be paid to the EG Lenders, Pro Rata, and

(ii) the other 50% of the Distributable GST Collection Claim Proceeds (the "Trust Distributable GST Collection Claim Proceeds") shall be paid to the Litigation Trust for the benefit of the Beneficiaries. The Trust Distributable GST Collection Claim Proceeds, less any GST Collection Claim Expenses not approved by the Bankruptcy Court, shall be distributed to the Beneficiaries in accordance with Section 3.2.

4.5 Segregation of Accounts. The GST Collection Claim Proceeds, if any, shall be maintained by the Litigation Trustee in a segregated interest bearing account, which account shall contain only the GST Collection Claim Proceeds, if any, and not other Trust Assets.

## ARTICLE V

### RIGHTS, POWERS AND DUTIES OF LITIGATION TRUSTEE

5.1 Role of the Litigation Trustee. In furtherance of and consistent with the purpose of the Litigation Trust and the Plan, subject to the terms and conditions contained herein and in the Plan, the Litigation Trustee shall (i) hold the Trust Assets for the benefit of the holders of Allowed General Unsecured Claims and, with respect to the GST Collections Claim, the GST Beneficiaries and such other beneficiaries as described in Section 3.2, (ii) make distributions of Litigation Claim Proceeds and other Trust Assets in accordance with the Section 3.2, (iii) make distributions of the GST Collection Claim Proceeds in accordance with Section 4.4, (iv) prosecute and resolve Litigation Claims (subject to section 2.5 and 4.2) and (v) object to the allowance of Claims. The Litigation Trustee shall be responsible for all decisions and duties with respect to the Litigation Trust and the Trust Assets. In all circumstances, the Litigation Trustee shall act in the best interests of all beneficiaries of the Litigation Trust and in furtherance of the purpose of the Litigation Trust, and shall use commercially reasonable efforts to dispose of the Trust Assets and to make timely distributions and not unduly prolong the duration of the Litigation Trust.

5.2 Prosecution of Litigation Claims. Subject to the provisions of this Litigation Trust Agreement (including Article IV) and at the direction of the Trust Governing Board, the Litigation Trustee shall hold, pursue, prosecute, release, settle or abandon, as the case may be, any and all Litigation Claims (including any counterclaims to the extent such counterclaims are setoff against the proceeds of any such causes of action). To the extent that any action has been taken to prosecute or otherwise resolve any Litigation Claims prior to the Effective Date by the Debtors and/or the Committee, the Litigation Trustee shall be substituted for the Debtors and/or the Committee in connection therewith. For purposes of exercising its powers, the Litigation Trustee shall be deemed to be a representative of the estate pursuant to section 1123(b)(3)(B) of the Bankruptcy Code.



5.3 Authority to Settle Litigation Claims. Subject to obtaining the written consent of the Trust Governing Board to a proposed settlement, disposition or abandonment of a Litigation Claim (including any counterclaims to the extent such counterclaims are setoff against the proceeds of any such Litigation Claims), the Litigation Trustee shall be empowered and authorized to settle, dispose of or abandon any Litigation Claims (including any counterclaims to the extent such counterclaims are setoff against the proceeds of any such Litigation Claims) without the need for approval by the Bankruptcy Court. The Litigation Trustee will notify the Trust Governing Board of any proposal for the settlement by or to the Litigation Trustee in respect of any Litigation Claim (including any counterclaims to the extent such counterclaims are setoff against the proceeds of any such Litigation Claim), and shall be directed by the Trust Governing Board in making, accepting or rejecting any such proposal. Any determinations by the Litigation Trustee, with the consent or at the direction of the Trust Governing Board, with regard to the amount or timing of settlement or other disposition of any Litigation Claim shall be conclusive and binding on all Beneficiaries and all other parties in interest, provided that such determinations are made in good faith. Notwithstanding the foregoing, the Litigation Trustee shall have the right to submit to the Bankruptcy Court any question or questions regarding which the Litigation Trustee may desire to have explicit approval of the Bankruptcy Court for the taking of any specific action proposed to be taken by the Litigation Trustee with respect to the Trust Assets, the Litigation Trust, this Litigation Trust Agreement or the Plan, including the administration and distribution of the Trust Assets. Further, the Litigation Trustee may, in the exercise of its duties hereunder, seek Bankruptcy Court review and approval with respect to any direction issued by the Trust Governing Board. The Bankruptcy Court shall retain jurisdiction for the purposes contemplated in this Section 5.3 and shall approve or disapprove any proposed action upon motion by the Litigation Trustee. In addition, the Litigation Trustee shall have the authority, but not the obligation, to seek Bankruptcy Court approval to sell any Trust Asset free and clear of any and all liens, claims and encumbrances. This Section 5.3 shall not apply to the settlement, disposition or abandonment of the GST Collection Claim, which shall be governed by Section 4.2.

5.4 Retention of Litigation Counsel and Other Professionals. The Litigation Trustee may (a) retain such experts and advisors (including, but not limited to, counsel, tax advisors, consultants, or other professionals) as the Litigation Trustee deems necessary to aid it in the performance of its duties and responsibilities hereunder and under the Plan and to perform such other functions as may be appropriate in furtherance of the intent and purpose of this Litigation Trust Agreement, and (b) commit the Litigation Trust to provide such professional persons or entities reasonable compensation and reimbursement from the Trust Assets for services rendered and expenses incurred. The Litigation Trustee will make all reasonable and customary arrangements for payment or reimbursement of such compensation and expenses and will pay the same as Litigation Claims Costs in accordance with the provisions of Sections 5.5 and 5.6 of this Litigation Trust Agreement, and in the case of the GST Collection Expenses, Section 4.3.

5.5 Litigation Trust Expenses. The Litigation Trustee may incur any reasonable and necessary expenses in liquidating the Trust Assets, objecting to the allowance of Claims, administering the Litigation Trust and performing such other duties imposed hereunder.

(a) The Litigation Trustee shall maintain a litigation expense fund (the "Litigation Expense Fund") and expend the assets of the Litigation Expense Fund (i) as are

reasonably necessary to meet contingent liabilities and to maintain the value of the assets of the Litigation Trust during liquidation, (ii) object to the allowance of Claims, (iii) to pay reasonable administrative expenses (including but not limited to, the costs and expenses of the Litigation Trustee (including reasonable fees, costs, and expenses of professionals) and the Directors of the Trust Governing Board (but excluding the fees of professionals retained by such Directors), any taxes imposed on the Litigation Trust or in respect of the Trust Assets or fees and expenses in connection with, arising out of or related to the Trust Assets, and (iv) to satisfy other liabilities incurred or assumed by the Litigation Trust (or to which the assets are otherwise subject) in accordance with the Plan or this Litigation Trust Agreement.

(b) The Litigation Trustee may retain and add to the Litigation Expense Fund, at any time and from time to time, such amounts as the Litigation Trustee deems reasonable and appropriate to ensure that the Litigation Expense Fund will be adequate to meet the expenses and liabilities described in this Section 5.5(a) above; provided, however, that proceeds of the Guaranty Claim GST Allocation shall remain segregated in accordance with Section 4.5 and shall not be transferred to the Litigation Expense fund.

(c) Notwithstanding any other provision of this Litigation Trust Agreement to the contrary, including Article IV, the Litigation Trustee shall not be required to take any action or enter into or maintain any claim, demand, action or proceeding relating to the Litigation Trust unless it shall have sufficient funds in the Litigation Expense Fund for that purpose.

#### 5.6 Distributions.

(a) As soon as reasonably practicable in the reasonable discretion of the Litigation Trustee and with the consent of the Trust Governing Board, and subject to the requirements of Revenue Procedure 94-45, the Litigation Trustee shall distribute all Cash on hand (including, but not limited to, the Litigation Trust's net income and net proceeds from the sale of assets, any Cash received on account of or representing Litigation Claims Proceeds and treating as Cash for purposes of this Section 5.6 any permitted investments under Section 5.12 below), except such amounts (i) as would be distributable to a holder of a Disputed General Unsecured Claim (as of the time of such distribution) if such Disputed Claim had been Allowed in the full amount asserted by the holder of such Claim prior to the time of such distribution (but only until such Claim is resolved), which amounts shall be held in the Disputed Claims Reserve, and (ii) as are reasonably necessary, in the sole discretion of the Litigation Trustee, for the Litigation Expense Fund. The Litigation Trustee shall make all such distributions in accordance with Sections 3.2 and 4.4, as applicable.

(b) The Litigation Trust may withhold from amounts distributable to any Person any and all amounts, determined in the Litigation Trustee's reasonable sole discretion, required by any law, regulation, rule, ruling, directive, or other governmental requirement. Any Trust Assets which are undistributable in accordance with this Section 5.6(b) as of the termination of the Litigation Trust hereof shall be distributed in accordance with Section 3.2 and 4.4, as applicable.

(c) Holders of Claims of less than \$1,000 that did not request a distribution for such Claim in writing to the Reorganized Debtors in accordance with section 8.10 of the Plan shall not be entitled to a distribution from the Litigation Trust.

(d) If any Cash or other distribution pursuant to this Litigation Trust Agreement to any Beneficiary or EG Lender is returned as undeliverable, no further distributions to such Beneficiary or EG Lender shall be made until such time as the Litigation Trustee is notified by written certification of such Beneficiary's or EG Lender's then-current address, at which time distributions to such Beneficiary or EG Lender shall be made without interest.

(e) If any check evidencing payment pursuant to this Litigation Trust Agreement to any Beneficiary or EG Lender remains uncashed for sixty (60) days after the date upon which the check was issued, such check shall be cancelled and the distribution evidenced thereby shall be subject to Section 5.6(f).

(f) Any Beneficiary or EG Lender that does not assert a claim pursuant to this Litigation Trust Agreement and the Plan for an undeliverable distribution within six (6) months after the distribution was initially attempted shall have its claim for such undeliverable distribution discharged and such distributions shall be deemed to be unclaimed property under Section 347(b) of the Bankruptcy Code. After such date, all Cash or other distribution shall be forfeited and transferred to the Litigation Trustee and the claim of any Beneficiary or EG Lender to such Cash or other distribution pursuant to this Litigation Trust Agreement and the Plan shall be discharged and forever barred. Further, to the extent that such distribution was an interim distribution, such Beneficiary shall be deemed to waive its rights to receive any future distributions. Any such Beneficiary shall be forever barred from asserting any such claim against the Reorganized Debtors and the Litigation Trust. Nothing contained in this Litigation Trust Agreement and the Plan shall require the Reorganized Debtors or the Litigation Trustee to attempt to locate any Beneficiary or EG Lender. The Litigation Trustee shall use its reasonable good faith efforts to locate the holders of the Participating Permitted Construction Claims and the EG Lenders.

5.7 Setoff Rights. The Litigation Trustee may, but shall not be required to, setoff against or recoup from the holder of any Allowed Claim on which payments or other distributions are to be made hereunder, claims of any nature that the Litigation Trust may have against the holder of such Allowed Claim. However, neither the failure to do so, nor the allowance of any Claim under the Plan, shall constitute a waiver or release of any such claim, right of setoff or right of recoupment against the holder of such Allowed Claim.

5.8 Right to Object to Claims. The Litigation Trustee shall have the responsibility and authority for administering, disputing, objecting to, compromising and settling or otherwise resolving and finalizing distributions (if any) with respect to any Claims. In addition, the Litigation Trustee may, at any time, request that the Bankruptcy Court estimate any contingent or unliquidated Claim pursuant to Section 502(c) of the Bankruptcy Code regardless of whether the Debtors have previously objected to such Claim.

5.9 Reserve Accounts for Disputed General Unsecured Claims. On and after the Effective Date, the Litigation Trustee shall establish the Disputed Claims Reserve. The Disputed

Claims Reserve shall consist solely of Cash in an aggregate amount sufficient to pay to each holder of a Disputed General Unsecured Claim the amount that such holder would be entitled to receive from the Litigation Trust under this Litigation Trust Agreement if such Disputed General Unsecured Claim immediately became Allowed in full, subject to an allocable share of all expenses and obligations of the Litigation Trust. The Litigation Trustee shall have no obligation to deposit any Cash into the Disputed Claims Reserve until the Litigation Trustee elects to make distributions in accordance with Section 5.6. The Litigation Trustee shall remove funds from the Disputed Claims Reserve as the Disputed General Unsecured Claims are resolved, which funds shall be distributed as provided in Section 5.6(a).

#### 5.10 Management of Trust Assets.

(a) Except as otherwise provided in this Litigation Trust Agreement, the Plan or the Confirmation Order, and subject to U.S. Treasury Regulations governing liquidating trusts and the retained jurisdiction of the Bankruptcy Court as provided for in the Plan, but without prior or further authorization, the Litigation Trustee may with the written consent of the Trust Governing Board control and exercise authority over the Trust Assets, over the acquisition, management and disposition thereof and over the management and conduct of the Litigation Trust, in each case, to the extent necessary to enable the Litigation Trustee to fulfill the intents and purposes of this Litigation Trust Agreement. No person dealing with the Litigation Trust will be obligated to inquire into the authority of the Litigation Trustee in connection with the acquisition, management or disposition of the Trust Assets.

(b) In connection with the management and use of the Trust Assets and except as otherwise expressly limited in this Litigation Trust Agreement (including Article IV), the Plan or the Confirmation Order, the Litigation Trustee will have, in addition to any powers conferred upon the Litigation Trustee by any other provision of this Litigation Trust Agreement, the power to take any and all actions as, in the Litigation Trustee's discretion, subject to the written consent of the Trust Governing Board, as are necessary or advisable to effectuate the primary purposes of the Litigation Trust, including, without limitation, the power and authority (i) to distribute the Trust Assets to Beneficiaries and, with respect to the GST Collection Claim, the GST Beneficiaries in accordance with the terms of this Litigation Trust Agreement and the Plan, (ii) to pay all expenses of the Litigation Trust, (iii) to sell, convey, transfer, assign, liquidate or abandon the Trust Assets, or any part thereof or any interest therein, upon such terms and for such consideration as may be commercially reasonable, (iv) to endorse the payment of notes or other obligations of any Person or to make contracts with respect thereto, and (v) to borrow such sums of money, at any time and from time to time, for such periods of time, upon such terms and conditions, from such Persons, for such purposes as may be commercially reasonable. The Litigation Trustee will not at any time, on behalf of the Litigation Trust or the Beneficiaries, enter into or engage in any trade or business, and no part of the Trust Assets will be used or disposed of by the Litigation Trustee in furtherance of any trade or business.

(c) Except as set forth in Article IV, upon obtaining the written consent of the Trust Governing Board, to the extent necessary, all decisions and actions taken by the Litigation Trustee under the authority of this Litigation Trust Agreement will be binding upon all of the Beneficiaries, the EG Lenders and the Litigation Trust.

5.11 Investment of Cash. Subject to Section 4.5 below and Section 5.14 and as may otherwise be reasonably prudent, the Litigation Trustee may invest any Cash (including any earnings thereon or proceeds therefrom) in United States Treasury bills and notes, institutional money market funds, commercial paper and time deposits and certificates of deposit with commercial banks, in each case, with a maturity of twelve months or less; provided, however, that the scope of any such investments shall be limited to investments permitted to be made by a liquidating trust within the meaning of U.S. Treasury Regulation section 301.7701-4(d) or under applicable IRS guidelines, rulings or other controlling authorities; provided, further, however, that sections 11-2.3, 11-2.3-A and 11-2.4 of the Estates, Powers and Trusts Law of New York shall be inapplicable to the Litigation Trust herein.

5.12 Additional Powers of the Litigation Trustee. In addition to any and all of the powers enumerated above, and except as otherwise provided in this Litigation Trust Agreement (including Article IV), the Plan or the Confirmation Order, and subject to the U.S. Treasury Regulations governing liquidating trusts and the retained jurisdiction of the Bankruptcy Court as provided for in the Plan, the Litigation Trustee, in consultation with and at the direction of the Trust Governing Board, shall be empowered to:

(a) hold legal title to any and all rights of the holders of the Litigation Trust Interests in or arising from the Trust Assets, including, but not limited to, the right to collect any and all money and other property belonging to the Litigation Trust;

(b) perform the duties, exercise the powers, and assert the rights of a Trustee under sections 704 and 1106 of the Bankruptcy Code with respect to the Trust Assets, including assert claims, defenses, offsets, and privileges;

(c) protect and enforce the rights of the Litigation Trust to the Trust Assets by any method deemed appropriate including, without limitation, by judicial proceedings or pursuant to any applicable bankruptcy, insolvency, moratorium, or similar law and general principles of equity;

(d) determine and satisfy any and all liabilities created, incurred or assumed by the Litigation Trust;

(e) assert or waive any privilege or defense on behalf of the Litigation Trust;

(f) make all payments relating to the Trust Assets;

(g) obtain insurance coverage with respect to the liabilities and obligations of the Litigation Trust under this Litigation Trust Agreement (in the form of an errors and omissions policy or otherwise);

(h) file, if necessary, any and all tax and information returns with respect to the Litigation Trust and pay taxes properly payable by the Litigation Trust, if any;

(i) request any appropriate tax determination with respect to the Litigation Trust, including, without limitation, a determination pursuant to section 505 of the Bankruptcy Code;

(j) retain and reasonably compensate for services rendered and expenses incurred an accounting firm or financial consulting firm to perform such reviews and/or audits of the financial books and records of the Litigation Trust as may be appropriate in the Litigation Trustee's discretion and to prepare and file any tax returns or informational returns for the Litigation Trust as may be required;

(k) take or refrain from taking any and all actions the Litigation Trustee reasonably deems necessary for the continuation, protection, and maximization of the Trust Assets consistent with the purposes hereof.

(l) take all steps and execute all instruments and documents necessary to effectuate the Litigation Trust;

(m) take all actions necessary to comply with the Plan and this Litigation Trust Agreement and the obligations thereunder and hereunder; and

(n) exercise such other powers as may be vested in the Litigation Trustee pursuant to an order of the Bankruptcy Court or this Litigation Trust Agreement.

5.13 Limitations on Power and Authority of the Litigation Trustee. The Litigation Trustee must consult with the Trust Governing Board concerning any matter involving and amount equal to or exceeding \$150,000 and obtain the prior approval of the Trust Governing Board on other specific matters described in this Litigation Trust Agreement. Notwithstanding anything in this Trust Agreement to the contrary, the Litigation Trustee will not have the authority to do any of the following:

(a) take any action in contravention of this Litigation Trust Agreement, the Plan or the Confirmation Order;

(b) take any action which would make it impossible to carry on the activities of the Litigation Trust;

(c) possess property of the Litigation Trust or assign the Litigation Trust's rights in specific property for other than Litigation Trust purposes;

(d) settle, dispose of or abandon the GST Collection Claim without (i) consultation with the Trust Governing Board; and (ii) the approval of the Bankruptcy Court, upon motion with notice to the EG Lenders.

(e) engage in any trade or business;

(f) permit the Litigation Trust to receive or retain cash or cash equivalents in excess of a reasonable amount necessary to meet claims and contingent liabilities or to maintain the value of its assets during liquidation;

(g) take any action which unreasonably prolongs the liquidation of the Litigation Trust or is utilized to further the control or profitable operation of a going business on a permanent continuing business, or otherwise engage in any investments or activities

inconsistent with the treatment of the Litigation Trust as a liquidating trust within the meaning of U.S. Treasury Regulation section 301.7701-4(d); or

(h) hold stock (in either vote or value) of any entity that is treated as a corporation for federal income tax purposes, or have any interest in an entity that is treated as a partnership for federal income tax purposes.

5.14 Books and Records. The Litigation Trustee shall maintain in respect of the Litigation Trust and the holders of Litigation Trust Interests books and records relating to the Trust Assets and income of the Litigation Trust and the payment of, expenses of, and liabilities of claims against or assumed by, the Litigation Trust in such detail and for such period of time as may be necessary to enable it to make full and proper accounting in respect thereof. Such books and records shall be maintained as reasonably necessary to facilitate compliance with the tax reporting requirements of the Litigation Trust. Except as otherwise provided for in this Litigation Trust Agreement, nothing in this Litigation Trust Agreement requires the Litigation Trustee to file any accounting or seek approval of any court with respect to the administration of the Litigation Trust, or as a condition for managing any payment or distribution out of the Trust Assets. Holders of the Litigation Trust Interests and their duly authorized representatives shall have the right upon thirty (30) days' prior written notice delivered to the Litigation Trust to inspect such books and records (including financial statements), subject to the Litigation Trustee's right to deny access in a reasonable effort to preserve privileged or confidential information or protect litigation or other strategies and provided that, if so requested by the Litigation Trustee, such holder shall have entered into a confidentiality agreement satisfactory in form and substance to the Litigation Trustee.

#### 5.15 Reports.

(a) Securities Reports. Under section 1145 of the Bankruptcy Code, the issuance of Litigation Trust Interests under the Plan shall be exempt from registration under the Securities Act of 1933, as amended, and applicable state and local laws requiring registration of securities. If the Litigation Trustee determines, with the advice of counsel, that the Litigation Trustee is required to comply with the registration and reporting requirements of the Securities Exchange Act of 1934, as amended, or the Investment Company Act of 1940, as amended, then the Litigation Trustee shall take any and all actions to comply with such reporting requirements and file periodic reports with the Securities and Exchange Commission.

(b) Financial and Status Reports. On the anniversary date of the Effective Date, and as soon as practicable upon termination of the Litigation Trust, the Litigation Trustee shall make available upon request to each holder of Litigation Trust Interests appearing on his/her records as of the end of such period or such date of termination a written report including: (i) financial statements of the Litigation Trust for such period, and, if the end of a calendar year, a report (which may be prepared by an independent certified public accountant employed by the Litigation Trustee) reflecting the result of such agreed upon procedures relating to the financial accounting administration of the Litigation Trust as proposed by the Litigation Trustee; (ii) a description of any action taken by the Litigation Trustee in the performance of his duties which materially affects the Litigation Trust and of which notice has not previously been given to the holders of Litigation Trust Interests; (iii) the status of the claims and causes of action assigned to

the Litigation Trust; and (iv) a description of the progress of converting Trust Assets to Cash and making distributions to holders of Litigation Trust Interests and any other material information relating to the Trust Assets and the administration of the Litigation Trust (the "Trust Reports"). The Litigation Trustee shall make available to the EG Lenders Trust Reports with respect to matters relating solely to the GST Collection Claims. The Litigation Trustee shall post Trust Reports on a web site maintained by the Litigation Trustee or electronically file it with the Bankruptcy Court (unless otherwise prohibited by law).

(c) Annual Plan and Budget. If instructed by the Trust Governing Board, the Litigation Trustee shall prepare and submit to the Trust Governing Board for approval an annual plan and budget prior to the commencement of each fiscal year of the Litigation Trust, provided, however, that the first such report shall be submitted no later than sixty (60) days after the Effective Date. Such annual plan and budget shall set forth in reasonable detail: (i) the Litigation Trustee's anticipated actions to administer and liquidate the Trust Assets; and (ii) the anticipated expenses, including professional fees, associated with conducting the affairs of the Litigation Trust. Such annual plan and budget shall be updated and submitted to the Trust Governing Board for review and approval on a quarterly basis, and each such quarterly update shall reflect the differences between the anticipated actions described in the annual report and actual operations of the Litigation Trustee to date. All actions by the Litigation Trustee must be consistent with the plan and budget, as updated on a quarterly basis.

5.16 Communications with Trust Governing Board. To the extent the Litigation Trustee is required to communicate with the Trust Governing Board under this Litigation Trust Agreement, (i) the Litigation Trustee may direct all communications to the Trust Governing Board to counsel (if such counsel exists) for the Trust Governing Board and (ii) the Litigation Trustee may require that the Trust Governing Board maintain as confidential any confidential or proprietary information concerning the prosecution of the Litigation Claims (including counterclaims, if any).

5.17 Compliance with Laws. Any and all distributions of Trust Assets and proceeds of borrowings, if any, shall be in compliance with applicable laws, including, but not limited to, applicable federal and state securities laws.

5.18 Charitable Donations. In no event shall any part of the Trust Assets revert to or be distributed to any Debtor or Reorganized Debtor. To the extent that any property or assets with a fair market value of less than \$10,000 remain in the Litigation Trust (or Disputed Claims Reserve, as applicable) after the Litigation Trustee has made a final distribution in accordance with this Litigation Trust Agreement, after satisfaction of all costs and expenses of the administration of the Litigation Trust, the Litigation Trustee may request an order from the Bankruptcy Court authorizing that such residue be contributed to a charitable organization described in section 501(c)(3) of the Tax Code and exempt from U.S. federal income tax under section 501(a) of the Tax Code that is unrelated to the Debtors, the Reorganized Debtors, the Litigation Trust, the Litigation Trustee and any insider of the Litigation Trust, or authorizing such other disposition as recommended by the Litigation Trustee and approved by the Bankruptcy Court.



## ARTICLE VI

### THE LITIGATION TRUSTEE

6.1 Independent Trustee. The Litigation Trustee may not be a Beneficiary or related or subordinate (within the meaning of section 672(c) of the Tax Code) to any Beneficiary.

6.2 Trustee's Compensation and Reimbursement. The Litigation Trustee shall receive compensation from the Litigation Trust as follows:

(a) Compensation. [TO COME]

(b) Expenses. In addition, the Litigation Trust will reimburse the Litigation Trustee (out of the proceeds of the Trust Assets) for all reasonable, out-of-pocket expenses incurred by the Litigation Trustee in connection with the performance of its duties hereunder and under the Plan.

(c) Payment. The fees and expenses payable to the Litigation Trustee shall be paid to the Litigation Trustee upon approval of such fees by the Trust Governing Board without necessity for review or approval by the Bankruptcy Court or any other Person. The Bankruptcy Court shall retain jurisdiction to adjudicate any dispute between the Litigation Trustee and the Trust Governing Board regarding the fees, incentive compensation, and expenses of the Litigation Trustee.

6.3 Modification of Compensation Terms. The Trust Governing Board may, with the unanimous consent of each of the Directors of the Trust Governing Board, and without application to or approval by the Bankruptcy Court, subject to the consent of the Litigation Trustee, reasonably modify the Litigation Trustee's compensation and other terms regarding the retention of the Litigation Trustee.

6.4 Resignation. The Litigation Trustee may resign by giving not less than ninety (90) days' prior written notice thereof to the Trust Governing Board. Such resignation shall become effective on the later to occur of (i) the day specified in such notice, and (ii) the appointment of a successor by the Trust Governing Board and the acceptance by such successor of such appointment. If a successor Litigation Trustee is not appointed or does not accept its appointment within ninety (90) days following delivery of notice of resignation, the Litigation Trustee may petition any court of competent jurisdiction for the appointment of a successor Litigation Trustee.

6.5 Removal.

(a) The Trust Governing Board may remove the Litigation Trustee for Cause.

(b) For purposes of this Section 6.5 and Section 7.8 below, "Cause" shall be defined as: (i) theft or embezzlement or attempted theft or embezzlement of money or tangible or intangible assets or property; (ii) violation of any law (whether foreign or domestic), which results in a felony indictment or similar judicial proceeding; (iii) recklessness, gross negligence, willful misconduct, or knowing violation of law, in the performance of his or her duties; or (iv)

failure to perform any of his or her other material duties under this Litigation Trust Agreement; provided, however, that a reasonable period shall be given to cure any alleged Cause under clauses (iii) (other than willful misconduct) and (iv).

(c) To the extent there is any dispute regarding the removal of a Litigation Trustee (including any dispute relating to any compensation or expense reimbursement due under this Litigation Trust Agreement), the Bankruptcy Court shall retain jurisdiction to consider and adjudicate any such dispute and may remove a Litigation Trustee for Cause. Notwithstanding the foregoing, the Litigation Trustee will continue to serve as a trustee after his removal until the earlier of (a) the time when appointment of a successor Litigation Trustee will become effective in accordance with Section 6.4 of this Litigation Trust Agreement or (b) such date as the Bankruptcy Court otherwise orders.

6.6 Appointment of Successor Litigation Trustee. In the event of the death (in the case of a Litigation Trustee that is a natural person), dissolution (in the case of a Litigation Trustee that is not a natural person), resignation, incompetency, or removal of the Litigation Trustee, the Trust Governing Board shall designate a successor Litigation Trustee. Such appointment shall specify the date on which such appointment shall be effective. Every successor Litigation Trustee appointed hereunder shall execute, acknowledge, and deliver to the Bankruptcy Court and to the retiring Litigation Trustee an instrument accepting the appointment under this Litigation Trust Agreement and agreeing to be bound thereto, and thereupon the successor Litigation Trustee, without any further act, deed, or conveyance, shall become vested with all rights, powers, trusts, and duties of the retiring Litigation Trustee; provided, however, that a removed or resigning Litigation Trustee shall, nevertheless, when requested in writing by the successor Litigation Trustee, execute and deliver an instrument or instruments conveying and transferring to such successor Litigation Trustee under the Litigation Trust all the estates, properties, rights, powers, and trusts of such predecessor Litigation Trustee.

6.7 Effect of Resignation or Removal. The death, resignation, incompetency or removal of the Litigation Trustee shall not operate to terminate the Litigation Trust created by this Litigation Trust Agreement or to revoke any existing agency created pursuant to the terms of this Litigation Trust Agreement or invalidate any action theretofore taken by the Litigation Trustee or any prior Litigation Trustee. In the event of the resignation or removal of the Litigation Trustee, such Litigation Trustee will promptly (a) execute and deliver such documents, instruments and other writings as may be ordered by the Bankruptcy Court or reasonably requested by the successor Litigation Trustee to effect the termination of such Litigation Trustee's capacity under this Litigation Trust Agreement, (b) deliver to the Bankruptcy Court or the successor Litigation Trustee all documents, instruments, records and other writings related to the Litigation Trust as may be in the possession of such Litigation Trustee (provided that such Litigation Trustee may retain one copy of such documents for archival purposes) and (c) otherwise assist and cooperate in effecting the assumption of its obligations and functions by such successor Litigation Trustee.

6.8 Confidentiality. The Litigation Trustee shall, during the period that it/he/she serves as Litigation Trustee under this Litigation Trust Agreement and following the termination of this Litigation Trust Agreement or following its/his/her removal or resignation hereunder, hold strictly confidential and not use for personal gain any material, non-public information of or

pertaining to any entity to which any of the Trust Assets relates or of which it/he/she has become aware in its/his/her capacity as Litigation Trustee, except as otherwise required by law.

## ARTICLE VII

### TRUST GOVERNING BOARD

7.1 The Trust Governing Board. On the Effective Date, a governing board (the "Trust Governing Board") of three (3) persons or entities shall commence serving as directors of the Litigation Trust (each, a "Director"), with one (1) Director selected as the Tier A Director, one (1) Director selected as the Tier B Director and one (1) Director selected as the Tier C Director. The initial Directors shall be as follows:

\_\_\_\_\_ (Tier A Director),  
\_\_\_\_\_ (Tier B Director), and  
\_\_\_\_\_ (Tier C Director).

7.2 Authority and Responsibilities. The Trust Governing Board shall have the authority and responsibility to oversee, review, and guide the activities and performance of the Litigation Trustee and shall have the authority to remove the Litigation Trustee in accordance with Section 6.5 hereof. The Trust Governing Board shall also (a) monitor and review the fairness of settlement, abandonment and other disposition proposals proposed to or agreed to by the Litigation Trustee with respect to the Litigation Claims (including any counterclaims), (b) consult with the Litigation Trustee regarding the settlement, abandonment and other disposition and prosecution of the Litigation Claims (including any counterclaims), (c) monitor and oversee the administration of the Litigation Trust and the Litigation Trustee's performance of its responsibilities under this Litigation Trust Agreement and/or the Plan, and (d) perform such other tasks as set forth in this Litigation Trust Agreement and/or in the Plan. Unless otherwise consented to in writing by two of three Directors, the Directors' duties shall be limited to reasonable and appropriate review of materials circulated to the Trust Governing Board by the Litigation Trustee, other Directors or counsel for the Litigation Trustee, and preparation for and attendance at meetings of the Trust Governing Board or of the Trust Governing Board and the Litigation Trustee. The Directors' duties shall not include acting as lawyers for the Litigation Trust or otherwise performing legal work for the Litigation Trust, the Litigation Trustee, the Trust Governing Board, or any Director or beneficiary thereof. In all circumstances, except as explicitly provided herein, the Trust Governing Board shall exercise its responsibilities under the Litigation Trust consistent with fiduciary standards. In all circumstances, the Trust Governing Board shall act in the best interests of all beneficiaries of the Litigation Trust and in furtherance of the purpose of the Litigation Trust. The Litigation Trustee shall consult with and provide information to the Trust Governing Board in accordance with and pursuant to the terms of this Litigation Trust Agreement and the Plan.

7.3 Meetings of the Trust Governing Board. Meetings of the Trust Governing Board are to be held with such frequency and at such place as the Litigation Trustee and the Directors of the Trust Governing Board may determine in their reasonable discretion, but in no event shall such meetings be held less frequently than quarterly. Special meetings of the Trust Governing Board may be held whenever and wherever called for by the Litigation Trustee or any two

Directors of the Trust Governing Board. Any action required or permitted to be taken by the Trust Governing Board at a meeting may be taken without a meeting if the action is taken by unanimous written consent of the Trust Governing Board as evidenced by one or more written consents describing the action taken, signed by all Directors of the Trust Governing Board and recorded in the minutes, if any, or other transcript, if any, of proceedings of the Trust Governing Board. Unless the Trust Governing Board decides otherwise (which decision shall rest in the sole discretion of the Trust Governing Board, whether or not such decision is reasonable), the Litigation Trustee and its/his/her designated advisors may attend meetings of the Trust Governing Board.

7.4 Manner of Acting. Two (2) Directors of the Trust Governing Board shall constitute a quorum for the transaction of business at any meeting of the Trust Governing Board. The affirmative vote of two (2) of the Directors of the Trust Governing Board present at a meeting shall be the act of the Trust Governing Board except as otherwise required by law or as provided in this Litigation Trust Agreement. Any or all of the Directors of the Trust Governing Board may participate in a regular or special meeting by, or conduct the meeting through the use of, conference telephone or similar communications equipment by means of which all persons participating in the meeting may hear each other, in which case any required notice of such meeting may generally describe the arrangements (rather than or in addition to the place) for the holding thereof. Any Director participating in a meeting by this means is deemed to be present in person at the meeting. Voting (including on negative notice) may, if approved by the Directors at a meeting, be conducted by electronic mail or individual communications by the Litigation Trustee and each Director of the Trust Governing Board. For the avoidance of doubt, with the exception of a requirement for unanimity of the Directors as contained in this Litigation Trust Agreement, all decisions and actions of the Trust Governing Board shall require the consent of no less than two Directors.

7.5 Disagreement or No-Action. In the event that the Trust Governing Board cannot or is otherwise unable to reach a decision, whether to accept or reject, on a recommendation by the Litigation Trustee (the "Board Deadlock"), the Litigation Trustee may present such recommendation to the Bankruptcy Court for a determination upon thirty (30) days following the duly convened meeting at which the Board Deadlock occurred and is continuing. Further, in the event that the Litigation Trustee submits a written recommendation to the Trust Governing Board and no meeting is duly convened by the Trust Governing Board within such forty-five (45) day period (the "No Action Deadline"), the Litigation Trustee may present such recommendation to the Bankruptcy Court for a determination after the expiration of the No Action Deadline.

7.6 Tenure of the Members of the Trust Governing Board. The authority of the Directors of the Trust Governing Board will be effective as of the Effective Date and will remain and continue in full force and effect until the Litigation Trust is terminated in accordance with Article X hereof. The Directors of the Trust Governing Board will serve until death or resignation pursuant to Section 7.7 below, or removal pursuant to Section 7.8 below.

7.7 Resignation. A Trust Governing Board Director may resign by giving not less than ninety (90) days' prior written notice thereof to the Litigation Trustee and the other Trust Governing Board Directors. Such resignation shall become effective on the later to occur of (i)

the day specified in such notice; and (ii) the appointment of a successor in accordance with Section 7.9 below.

7.8 Removal. A Director of the Trust Governing Board may be removed by the unanimous vote of the other Directors of the Trust Governing Board, written resolution of which shall be delivered to the removed Trust Governing Board Director; provided, however, that such removal may only be made for Cause. No such removal will be effective until approved by the Bankruptcy Court upon at least twenty (20) days' notice.

7.9 Appointment of a Successor Trust Governing Board Director.

(a) In the event of a vacancy on the Trust Governing Board by removal, death, or resignation of a Tier A Director, Tier B Director or Tier C Director, a new Director shall be appointed to fill such position by a joint recommendation of the remaining Directors on the Trust Governing Board and the Litigation Trustee to the Bankruptcy Court. Upon the Bankruptcy Court's approval of such appointment, the appointment of a successor Director of the Trust Governing Board will be evidenced by the Litigation Trustee's filing with the Bankruptcy Court of a notice of appointment, which notice will include the name, address, and telephone number of the successor Director of the Trust Governing Board.

(b) Immediately upon the appointment of any successor Director of the Trust Governing Board, all rights, powers, duties, authority, and privileges of the predecessor Director of the Trust Governing Board hereunder will be vested in and undertaken by the successor Director of the Trust Governing Board without any further act; and the successor Director of the Trust Governing Board will not be liable personally for any act or omission of the predecessor Director of the Trust Governing Board.

(c) Every successor Trust Governing Board Director appointed hereunder shall execute, acknowledge and deliver to the Litigation Trustee and other Trust Governing Board Directors an instrument accepting the appointment under this Litigation Trust Agreement and agreeing to be bound thereto, and thereupon the successor Trust Governing Board Director without any further act, deed, or conveyance, shall become vested with all rights, powers, trusts, and duties of the retiring Trust Governing Board Director.

7.10 Compensation and Reimbursement of Expenses.

(a) Compensation From the Litigation Trust. All participating Directors shall be entitled to receive compensation from the Litigation Trust ("LT Fees") at a rate of (i) \$250 per telephonic meeting of the Trust Governing Board and (ii) \$1000 per in-person meeting of the Trust Governing Board, provided such meetings are regular or special meetings scheduled pursuant to section 7.4 of this Litigation Trust Agreement. LT Fees paid to Directors shall be limited as follows: (i) total LT Fees incurred and payable to each Director from the Effective Date to the first anniversary of the Effective Date shall not exceed \$7,000 per Director; (ii) total LT Fees incurred and payable to each Director from the first anniversary of the Effective Date to the second anniversary of the Effective Date shall not exceed \$7,000 per Director; and (iii) total LT Fees that are incurred and payable to each Director throughout the entire existence of the Litigation Trust shall in no circumstance exceed \$15,500 per Director.

(b) Compensation for Other Activities. Absent the consent of at least two of the three Directors to expand the role or responsibility of any Director, (i) no Director will be compensated by the Litigation Trust for services provided beyond the authority and responsibilities of Directors set forth in this Litigation Trust Agreement and (ii) no Director will be compensated by the Litigation Trust for attendance at or participation in non-Trust Governing Board meetings or conference calls.

(c) Expense Reimbursement. In addition, the Litigation Trust will reimburse the Directors of the Trust Governing Board for all actual, reasonable and documented out-of-pocket expenses incurred by the Directors in accordance with their roles as Directors hereunder. For the avoidance of doubt, other than reasonable expenses incurred by an Indemnified Person (as defined in section 8.2(a) below) who is or is threatened to be named or made a defendant or a respondent in a proceeding concerning the business and affairs of the Litigation Trust, any expense relating to professionals retained by or on behalf of the Directors individually shall not be an expense reimbursable from the Litigation Trust. All LT Fees and expenses of Trust Governing Board Directors shall be paid solely from Trust Assets as Litigation Claims Costs.

For the avoidance of doubt, the proceeds of the Guaranty Claim GST Allocation shall not be used to satisfy any of the obligations of this Section 7.10.

## ARTICLE VIII

### LIABILITY AND INDEMNIFICATION

8.1 No Further Liability. Each of the Litigation Trustee and the Trust Governing Board Directors shall not be liable for any action taken or omitted in good faith and reasonably believed by it/him/her to be authorized within the discretion or rights or powers conferred upon it/him/her in accordance with this Litigation Trust Agreement. In performing its/his/her duties under this Litigation Trust Agreement, each of the Litigation Trustee and the Trust Governing Board Directors shall have no liability for any action taken by the Litigation Trustee and the Trust Governing Board Directors in good faith in accordance with the advice of counsel, accountants, appraisers and other professionals retained by the Trust Governing Board Directors or the Litigation Trust. Without limiting the generality of the foregoing, the Litigation Trustee and the Trust Governing Board Directors may rely without independent investigation on copies of orders of the Bankruptcy Court reasonably believed by them to be genuine, and shall have no liability for actions taken in good faith in reliance thereon. None of the provisions of this Litigation Trust Agreement shall require the Litigation Trustee or the Trust Governing Board Directors to expend or risk their own funds or otherwise incur personal financial liability in the performance of any of their duties hereunder or in the exercise of any of their rights and powers. Each of the Litigation Trustee and the Trust Governing Board Directors may rely without inquiry upon writings delivered to it/him/her under the Plan which it/he/she reasonably believes in good faith to be genuine and to have been given by a proper Person. Notwithstanding the foregoing, nothing in this Section 8.1 shall relieve the Litigation Trustee or the Trust Governing Board Directors from any liability for any actions or omissions arising out of their gross negligence, willful misconduct, breach of fiduciary duty or knowing violation of law.

## 8.2 Indemnification of the Litigation Trustee and Trust Governing Board.

(a) To the fullest extent permitted by law, the Litigation Trust, to the extent of its assets legally available for that purpose, will indemnify and hold harmless the Litigation Trustee and the Trust Governing Board and each of their respective directors, members, shareholders, partners, officers, agents, professionals or employees (collectively, the "Indemnified Persons") from and against any and all loss, cost, damage, expense (including, without limitation, fees and expenses of attorneys and other advisors and any court costs incurred by any Indemnified Person) or liability by reason of anything any Indemnified Person did, does or refrains from doing for the business or affairs of the Litigation Trust, except to the extent that it is finally judicially determined by a court of competent jurisdiction that the loss, cost, damage, expense or liability resulted primarily from the Indemnified Person's gross negligence, willful misconduct, breach of fiduciary duty or knowing violation of law. To the extent reasonable, the Litigation Trust will pay in advance or reimburse reasonable expenses (including advancing reasonable costs of defense) incurred by the Indemnified Person who is or is threatened to be named or made a defendant or a respondent in a proceeding concerning the business and affairs of the Litigation Trust.

(b) The Litigation Trust, with the approval of the Bankruptcy Court, may indemnify any of the Indemnified Persons for any loss, cost, damage, expense or liability for which the Indemnified Persons would not be entitled to mandatory indemnification under this Section 8.2.

(c) Any Indemnified Person may waive the benefits of indemnification under this Section 8.2, but only by an instrument in writing executed by such Indemnified Person.

(d) The rights to indemnification under this Section 8.2 are not exclusive of other rights which any Indemnified Person may otherwise have at law or in equity, including without limitation common law rights to indemnification or contribution. Nothing in this Section 8.2 will affect the rights or obligations of any Person (or the limitations on those rights or obligations) under any other agreement or instrument to which that Person is a party.

8.3 Litigation Trust Liabilities. All liabilities of the Litigation Trust, including without limitation indemnity obligations under Section 8.2 of this Litigation Trust Agreement, will be liabilities of the Litigation Trust as an entity, and will be paid or satisfied from Trust Assets. No liability of the Litigation Trust will be payable in whole or in part by any Beneficiary in its/his/her capacity as a Beneficiary, by the Litigation Trustee in its/his/her capacity as Litigation Trustee, by any Trust Governing Board Director in its/his/her capacity as Trust Governing Board Director or by any member, partner, shareholder, director, officer, professional, employees, agent, affiliate or advisor of any Beneficiary, any Trust Governing Board Director, the Litigation Trustee or their respective affiliates.

## ARTICLE IX

### TAX MATTERS

9.1 Treatment of Trust Assets Transfer. For all federal income tax purposes, all parties (including, without limitation, the Litigation Trustee and the holders of Allowed General Unsecured Claims) shall treat the transfer of the Trust Assets to the Litigation Trust including any amounts or other assets subsequently transferred to the Litigation Trust (but only at such time as actually transferred) for the benefit of the holders of Allowed General Unsecured Claims, whether Allowed on or after the Effective Date and such other beneficiaries as described in Section 3.2 as (i) a transfer of the Trust Assets, for all purposes of the Tax Code directly to the beneficiaries of the Litigation Trust, followed by (ii) the transfer by such persons to the Litigation Trust of such Trust Assets in exchange for beneficial interests in the Litigation Trust. The holders of Allowed General Unsecured Claims, whether Allowed on or after the Effective Date, and such other beneficiaries as described in Section 3.2 shall be treated for federal income tax purposes as the grantors and owners of their respective shares of the applicable Trust Assets.

#### 9.2 Tax Reporting.

(a) Subject to definitive guidance from the IRS or a court of competent jurisdiction to the contrary (including the issuance of applicable U.S. Treasury Regulations, the receipt by the Litigation Trustee of a private letter ruling if the Litigation Trustee so requests one, or the receipt of an adverse determination by the IRS upon audit if not contested by the Litigation Trustee), all parties shall treat the Litigation Trust as a "liquidating trust" in accordance with U.S. Treasury Regulation section 301.7701-4(d), of which the holders of Allowed General Unsecured Claims, whether Allowed on or after the Effective Date, and such other beneficiaries as described in Section 3.2 are the grantors and beneficiaries. In the event an alternative treatment of the Litigation Trust is required for federal income tax purposes, the Litigation Trustee shall promptly notify in writing (or by comparable means) all holders of beneficial interests in the Litigation Trust, and anyone who subsequently becomes a holder, of such alternative treatment. The Litigation Trustee shall file returns for the Litigation Trust as a grantor trust pursuant to U.S. Treasury Regulation section 1.671-4(a) and in accordance with this Section 9.2. The Litigation Trustee also shall send annually to each record holder of a beneficial interest in the Litigation Trust a separate statement setting forth such holder's share of items of income, gain, loss, deduction, or credit and shall instruct all such holders to report such items on their federal income tax returns or to forward the appropriate information to the beneficial holders with instructions to report such items on their federal income tax returns. The Litigation Trustee shall also file (or cause to be filed) any other statements, returns, or disclosures relating to the Litigation Trust that are required by any governmental unit, including IRS Form 1041 (U.S. Income Tax Return for Estates and Trusts). Subject to Section 9.2(c) below, (i) the Litigation Trust's taxable income shall be allocated by reference to the manner in which an amount of Cash equal to such taxable income would be distributed (without regard to any restrictions on distribution described in the Plan) if, immediately prior to the deemed distribution, the Litigation Trust had distributed all of its other assets (valued at their tax book value) in accordance with the provisions of the Plan and the Litigation Trust Agreement, up to the tax book value of the Trust Assets treated as contributed by the holders of Allowed General Unsecured Claims, whether Allowed on or after the Effective Date, and such other beneficiaries



as described in Section 3.2, adjusted for prior taxable income and loss, and taking into account all prior and concurrent distributions (including all distributions held in escrow pending the resolution of Disputed General Unsecured Claims) from the Litigation Trust; and (ii) the Litigation Trust's taxable loss shall be allocated by reference to the manner in which an economic loss would be borne immediately after a liquidating distribution of the remaining assets of the Litigation Trust.

(b) As soon as possible after the Effective Date, the Litigation Trustee, in reliance upon such professionals as the Litigation Trustee may retain, shall make a good faith valuation of the value of the Trust Assets. Such valuation shall be made available from time to time, to the extent relevant as reasonably determined by the Litigation Trustee in reliance on his/her professionals, and used consistently by all parties (including, without limitation, the Litigation Trustee, and the Beneficiaries) for all purposes, including federal income tax purposes.

(c) Subject to definitive guidance from the IRS or a court of competent jurisdiction to the contrary (including the receipt by the Litigation Trustee of a private letter ruling if the Litigation Trustee requests one, or the receipt of an adverse determination by the IRS upon an audit if not contested by the Litigation Trustee), the Litigation Trustee shall (i) make an election pursuant to U.S. Treasury Regulation section 1.468B-9 to treat the Disputed Claims Reserve as a "disputed ownership fund" within the meaning of that section; (ii) treat as taxable income or loss of the Disputed Claims Reserve, with respect to any given taxable year, the portion of the taxable income or loss of the Litigation Trust that would have been allocated to the holders of Disputed General Unsecured Claims had such Claims been Allowed on the Effective Date (but only for the portion of the taxable year with respect to which such Claims are unresolved), (iii) treat as a distribution from the Disputed Claims Reserve any assets previously allocated to or retained on account of Disputed General Unsecured Claims as and when, and to the extent, such claims are subsequently resolved (following which time such assets shall no longer be held in the Disputed Claims Reserve), and (iv) to the extent permitted by applicable law, report consistent with the foregoing for state and local income tax purposes (including making any appropriate elections). The holders of Allowed General Unsecured Claims, whether Allowed on or after the Effective Date, and such other beneficiaries as described in Section 3.2 shall report, for tax purposes, consistent with the foregoing.

(d) The Litigation Trustee shall be responsible for payments, out of the Trust Assets, of any taxes imposed on the Litigation Trust or the Trust Assets, including the Disputed Claims Reserve.

(e) The Litigation Trustee may request an expedited determination of taxes of the Litigation Trust, including the Disputed Claims Reserve, under section 505(b) of the Bankruptcy Code, for all returns filed for, or on behalf of, the Litigation Trust for all taxable periods through the dissolution of the Litigation Trust (including the Disputed Claims Reserve).

9.3 EG Lender Tax Treatment. With respect to their right to certain proceeds from the recovery, if any, on the GST Collection Claim (as described in Article IV), the EG Lenders shall be treated, solely for purposes of this Article IX, in the same manner as holders of Allowed General Unsecured Claims. For solely federal, state and local tax purposes, the EG Lenders shall treat the contribution of the GST Collection Claim as a contribution of such claim to the

Litigation Trust in exchange for a beneficial interest in the Litigation Trust on all relevant tax returns and shall be bound by all of the provisions of this Article IX.

## ARTICLE X

### TERMINATION OF LITIGATION TRUST

10.1 Termination of Litigation Trust. The Litigation Trustee and the Litigation Trust shall be discharged or dissolved, as the case may be, at such time as (i) the Litigation Trustee determines that the pursuit of additional Litigation Claims is not likely to yield sufficient additional Litigation Claims Proceeds to justify further pursuit of such claims, subject to Section 4.2, and (ii) all distributions of Litigation Claims Proceeds and other Trust Assets required to be made by the Litigation Trustee under the Plan and this Litigation Trust Agreement have been made in accordance with Sections 3.2 and 4.4, but in no event shall the Litigation Trust be dissolved later than five (5) years from the Effective Date unless the Bankruptcy Court, upon motion made within the six (6) month period prior to such fifth (5th) anniversary (and, in the event for further extension, at least six (6) months prior to the end of the preceding extension) or the Litigation Trustee, determines that a fixed period extension (not to exceed three (3) years, together with any prior extensions, without a favorable letter ruling from the IRS that any further extension would not adversely affect the status of the Litigation Trust as a liquidating trust for federal income tax purposes) is necessary to facilitate or complete the recovery on and liquidation of the Trust Assets. Upon dissolution of the Litigation Trust, any remaining Cash on hand and other Trust Assets shall be distributed in accordance with Section 3.2 and Section 4.4 (if applicable). Further, upon dissolution of the Litigation Trust, all beneficial interests in the Litigation Trust will be extinguished, the legal existence of the Litigation Trust will terminate, and any remaining Trust Assets on such date will vest in the Reorganized Debtors free and clear of all claims, liens, encumbrances and other liabilities, in each case without further action of the Bankruptcy Court or any other court, administrative body or other agency. The Litigation Trustee may cause to be filed with any applicable governmental or other regulatory authority such certificate of dissolution or cancellation and any other certificates and documents as the Litigation Trustee, in its sole discretion, deems necessary to reflect the termination of the legal existence of the Litigation Trust, and may take any other action it deems necessary or desirable to reflect the transfer of all remaining Trust Assets (if any) to the Reorganized Debtors.

## ARTICLE XI

### AMENDMENT AND WAIVER

11.1 Amendment and Waiver. Any substantive provision of this Litigation Trust Agreement may be amended or waived by the Litigation Trustee upon notice and unanimous approval by the Trust Governing Board and approval of the Bankruptcy Court after proper notice. Technical amendments to this Litigation Trust Agreement may be made, as necessary to clarify this Litigation Trust Agreement or enable the Litigation Trustee to effectuate the terms of this Litigation Trust Agreement, by the Litigation Trustee with approval by the Trust Governing Board; provided, however, that all amendments of this Litigation Trust Agreement shall be consistent with the purpose and intention of the Plan and the Litigation Trust to liquidate in an

expeditious but orderly manner the Trust Assets in accordance with U.S. Treasury Regulation section 301.7701-4(d) and Section 2.4 hereof.

## ARTICLE XII

### MISCELLANEOUS PROVISIONS

12.1 Intention of Parties to Establish Litigation Trust. This Litigation Trust Agreement is intended to create for federal income tax purposes a "liquidating trust" that satisfies the requirements of Revenue Procedure 94-45 and, to the extent provided by law, shall be governed and construed in all respects as such a liquidating trust. Notwithstanding anything to the contrary contained herein, any ambiguity herein shall be construed consistent herewith and, if necessary, this Litigation Trust Agreement may be amended to comply with such federal income tax laws, which amendments may apply retroactively.

12.2 Effectiveness. This Litigation Trust Agreement shall become effective on the Effective Date.

12.3 Counterparts. This Litigation Trust Agreement may be executed in two or more counterparts, all of which shall be taken together to constitute one and the same instrument.

12.4 Governing Law. Except to the extent the Bankruptcy Code or Federal Rules of Bankruptcy Procedure are applicable, this Litigation Trust Agreement shall be governed by, and construed and enforced in accordance with, the federal laws of the United States and, to the extent there is no applicable federal law, the domestic laws of the state of New York, without giving effect to the principles of conflicts of law thereof.

12.5 Headings. Sections, subheadings and other headings used in this Litigation Trust Agreement are for convenience only and shall not affect the construction or interpretation of this Litigation Trust Agreement or any provision thereof.

12.6 Severability. If any provision of this Litigation Trust Agreement or the application thereof to any Person or circumstance shall be finally determined by a court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this Litigation Trust Agreement, or the application of such provision to Persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and such provisions of this Litigation Trust Agreement shall be valid and enforced to the fullest extent permitted by law.

12.7 Notices. All notices, requests or other communications, required or permitted to be made in accordance with this Litigation Trust Agreement, including any change of address of any Beneficiary for the purposes of receiving distributions from the Litigation Trust, shall be in writing and shall be delivered personally or by first class or express mail, return receipt requested. Notices should be mailed to:

- (a) If to the Litigation Trust or the Litigation Trustee:
- (b) If to the Trust Governing Board:

-and

- (c) If to Reorganized Debtors:
- (d) If to the Acquisition Companies:
- (e) If to a holder of a Litigation Trust Interest: To the name and address set forth on the registry maintained by the Litigation Trustee.
- (f) If to an EG Lender, to the name and address set forth on Schedule A.

IN WITNESS WHEREFORE, the parties hereto have either executed and acknowledged this Litigation Trust Agreement, or caused it to be executed and acknowledged on their behalf by their duly authorized officers all as of the date first above written.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Schedule A**  
**[TO BE PROVIDED]**

**EG LENDERS**

<b>Name of EG Lender</b>	<b>Address and Telephone Number</b>	<b>Pro Rata Portion of Guaranty Claim GST Allocation</b>

**Schedule B**  
**[TO BE PROVIDED]**

**Participating Permitted Construction Lenders**

<b>Name of EG Lender</b>	<b>Address and Telephone Number</b>